89-1255

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since the Interstate Commerce Act renders void any attempt by a motor carrier to limit freight loss and damage liability to less than the full value of the freight, and provides for an exception to this rule only where the shipper declares or agrees in writing to a lower value for a shipment, was it lawful for the Interstate Commerce Commission to approve motor carrier tariffs which purport to limit liability, without a shipper's declaration of value, to a value named in the tariff?

Was it arbitrary, capricious or contrary to law for the Commission to summarily approve such tariff limitations in a decision based expressly upon a "virtually unbroken string of decisions" upholding like tariffs, when the decisions on the issue by the circuits are in conflict?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below:

National Small Shipments Traffic Conference, Inc.
The Health and Personal Care Distribution Conference, Inc. (formerly named Drug and Toilet Preparation Traffic Conference, Inc.)
Interstate Commerce Commission
United States of America
National Freight Claims and Security Council of American Trucking Associations
National Motor Freight Traffic Association, Inc.
Roadway Express, Inc.

Petitioners, as named on the cover hereof, have no parent companies, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case. That court denied a petition to review a decision of the Interstate Commerce Commission which had dismissed a complaint filed by these Petitioners.

OPINION AND DECISION BELOW

The opinion of the United States Court of Appeals for the Third Circuit has been published as *National Small Shipments Traffic Conference v. United States,* 887 F.2d 443 (3d. Cir.

1989), and is attached as Appendix A. The Third Circuit's order denying rehearing is attached as Appendix C.

The Decision of the Interstate Commerce Commission dismissing Petitioners' complaint in ICC Docket No. MC—C-30102, *National Small Shipments Traffic Conference, Inc., et al. v. Consolidated Freightways Corp., et al.*, unpublished decision served January 23, 1989, is attached as Appendix B.

JURISDICTION

The opinion and judgment of the Third Circuit were entered on October 10, 1989. A timely petition for rehearing was denied on November 6, 1989. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Interstate Commerce Act:

49 USC §11707 Liability of common carriers under receipts and bills of lading

> (a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property. . . .
>
> * * *

(c)(1) A common carrier and freight forwarder may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

* * *

(c)(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

49 USC §10730 Rates and liability based on value

(b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a freight forwarder may, subject to the provisions of this chapter (including, with respect to a motor carrier, the general tariff requirements of section 10762 of this title), establish rates for the transportation of property (other than household goods) under which the liability of the carrier or freight forwarder for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier or freight fowarder and shipper if that value would be reasonable under the circumstances surrounding the transportation.

STATEMENT OF THE CASE

Alarmed by the efforts of a number of motor freight carriers to limit their liability to less than the statutory full value

recovery, these petitioners, associations of regular customers of the carriers, filed a complaint with the Interstate Commerce Commission against ten carriers. The complaint was addressed to tariff provisions whereby such carriers had published so-called automatic releases of liability to amounts stated in the tariff items. The Commission was asked to find such tariff provisions unlawful because they are contrary to Congressional intention in the Interstate Commerce Act, 49 U.S.C. §§11707 and 10730, which respectively impose (1) full value liability and (2) a limited exception to full liability only when the "shipper" (customer) makes a "written declaration" or a "written agreement" as to the value of the shipment.

The value limit authorized by the statute as an exception to the general rule of carrier liability for the full value of any loss or damage in transit is commonly known as a "released value". The shipper executes a written release setting the value of its freight at a level which becomes the upper limit of carrier liability. The carrier practice at issue in this case involves "automatic releases", under which the carrier purports to release the value for the shipper through a provision in the carrier's tariff whenever the shipper does not execute a release. Thus, the carrier would arrogate to itself an election which the statute leaves to the shipper.

In providing for a general rule of full liability and an exception for shipments tendered at released values, the Act codifies the comon law as set forth in cases such as *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884). Since 1884, this Court,[1] as well as the lower courts and the ICC, have frequently been called on to address the proper scope of carriers' attempts

[1] See *Adams Express v. Croninger*, 226 U.S. 491 (1913); *New York, N.H. & H.R.R. v. Nothnagle*, 346 U.S. 128, 134-35 (1953). This Court most recently addressed a related issue last term, in *Chan v. Korean Air Lines Ltd.*, 109 S.Ct. 1676 (1989).

to limit their liability for loss or damage to shippers' property. In past cases, the Commission has consistently rejected automatic releases.[2]

However, in the proceeding below, without taking evidence or receiving briefs on the merits, the Commission summarily dismissed the complaint on the grounds that judicial precedents already had well-settled the issue to the effect that the carriers could self-limit their liability by naming a value limit for liability purposes in their tariffs. Ignoring the majority of judicial decisions on this issue, the Commission declined to make its own analysis of the statutes. In effect, the Commission made a non-decision, turning its back on fifty years of its own administrative construction of this statute to the contrary.

The Commission's decision revokes the statute and leaves the shipping public bereft of the full value recovery which Congress established as the rule. The protective requirement of a written shipper declaration of a released value is swept away in favor of allowing carriers to establish value limits by their own tariffs in the absence of a value declaration by the shipper, notwithstanding the statute to the contrary. In this way, the exception of limited liability becomes the rule, and all shippers' freight is now fair game when they do no more than sign their names to accept a bill of lading[3] with no value stated on it.

Petitioners filed for judicial review of the agency's decision in the Third Circuit. Review of the agency's decision by the Third Circuit was pursuant to its jurisdiction under the Hobbs

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[2]See *Released Rates — Small Shipments Tariff*, 361 ICC 405, 415-17 (1979).

[3]The same statutory provision which establishes full value recovery also requires that a bill of lading be executed for every shipment via a motor carrier. 49 U.S.C. §11707(a)(1).

Act, 28 U.S.C. §§2321(a) and 2342(5). On October 10, 1989, the Third Circuit filed an Opinion denying the petition for review.

In the face of a Commission decision which was grounded on the premise that judicial precedents had already settled the question raised under the statute, the Opinion's affirmance of the ICC Decision rests on the proposition that a "reviewing court may not impose its own construction of a statute when the agency administering that statute has previously construed it." 887 F.2d at 447, Appendix A at A-12. Thus far, this case has been decided by a peculiar mirror effect under which (1) the Commission considered itself bound by judicial precedents which it found uniform (by ignoring the existence of the decisions to the contrary) and (2) the Court of Appeals considered itself bound by the Commission's construction of the statute, even though the Commission never made an independent construction of the statute. This is a clear misreading of the standard of review established in *Chevron USA Inc. v. NRDC Inc.*, 467 U.S. 837 (1984). At this juncture, this Court is the first forum in which these Shipper Conferences will be able to obtain an independent analysis of the controlling provisions of the Interstate Commerce Act.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED UNDER FEDERAL STATUTES WHICH SHOULD BE SETTLED BY THIS COURT.

Prior hereto, a shipper of freight had been secure in the knowledge that, unless it made a written declaration of value on the bill of lading, it would be fully recompensed for loss and damage in transit. The ICC Decision and the Opinion of the court of appeals below change all that, leaving the shipper

to the mercy of whatever value recovery limits the carriers choose to put in their tariffs. Whereas the printed bill of lading presented to the shipper contains a section[4] in which the shipper is invited to insert a value if it wants to declare or "release" the value of the shipment for recovery purposes, the decision under review holds that the carrier can limit the value for the shipper by a tariff provision, even if the shipper wants full carrier liability and has declined to execute the release on the bill of lading. This is exactly what Congress thought it was preventing by enacting the governing statutes.

The effect of the ICC decision is to shift most of the burden for loss or damage to a shipper's freight from the carrier, in whose custody the loss or damage occurred, to the shipper. Typically, released value provisions cover only a small fraction of the actual value of the freight. This result is clearly lawful where the shipper knowingly, and in writing, agrees to the released value. The statute, principles of estoppel, and the opportunity for shippers to make other arrangements, such as insurance, combine to support the traditional released value declaration as a matter of law and as sound policy. *None* of these factors supports automatic releases, as to which the Commission's own earlier characterization of "trap for the unwary" is an understatement.

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[4]Appendix D hereto is a copy of the uniform bill of lading. It makes provision for the shipper to elect whether to release the value of its shipment and it states that executing the value declaration is a prerequisite to a released value:

> Note: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
>
> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding_____ per _____.

An occasional shipper seeing the released value section of the bill of lading would certainly not be likely to understand that leaving it blank meant agreeing to the lowest value named in a carrier's tariff. The shipper would naturally understand that it could recover the actual value of loss or damage, as provided by statute. The frequent shipper, aware of the released value concept, would recognize the released value section of the bill of lading for what it has traditionally been: a means by which the shipper may agree to limit carrier liability in exchange for a special rate. The accepted way to ship at full value liability has always been simply to leave the released value section on the bill of lading unexecuted.

Because the ICC Decision approves a trap for all shippers, both occasional and frequent, this case warrants review by this Court. The importance of this case is compounded by the fact, discussed in the next section of this Petition, that the Third Circuit Decision and court decisions relied on by the ICC are in conflict with other court decisions, and with state laws.

Transportation by motor carrier pervades the American economy. There can be few, if any, businesses which neither ship nor receive freight via motor carrier. Interstate transportation, by definition, crosses state lines, and among those crossed lines are the lines separating frederal appellate circuits. At present, a shipper who agreed to no released value and who learned to its dismay, upon presenting a claim for loss or damage, that its carrier had an automatic release provision in its tariff, might find its right to recovery sustained or foreclosed, depending on the circuit in which it pursued its claim. Moreover, a number of states have outlawed automatic releases in intrastate commerce. A shipper who deliberately left the released value provision on the bills of lading blank to obtain full carrier liability, and who shipped its goods interstate to a warehouse, and then intrastate to various retail

outlets, could find its claim either paid in full, or reduced to a pittance, depending on where the loss or damage took place. This is an intolerable situation, which demands action by this Court to correct the errors made below.

Efforts by carriers to limit their liability for what they lose or destroy have been going on for centuries. Congress considered this problem and handled it by three interrelated provisions which can be briefly summarized:

> 1. The motor carrier is responsible for the full "actual loss or injury to the property". 49 U.S.C. §11707(a)(1).
>
> 2. The carrier may not limit its liability unilaterally by a "tariff". 49 U.S.C. §11707(c)(1).
>
> 3. As an exception to the rule of full value liability, a carrier may "establish rates" subject to a limited value recovery if the "shipper" makes a "written declaration" or a "written agreement" with the carrier to that effect. 49 U.S.C. §10730(b)(1).

These provisions show the will of Congress that the full value recovery standard not be defeated by the carrier itself by ***any*** provision that it might devise in its tariff. While there is an exception to full value liability, the exception is made absolutely dependent upon the shipper's written declaration or agreement in writing to a released value. And that is accomplished by the shipper executing the released value clause provided on the bill of lading for that purpose, as reproduced above.

The Congressional intent is totally defeated by the Commission's Decision finding that an automatic release inserted in a carrier's tariff meets the terms of the shipper-released value exception in the statute. The shipper is left in the same awful position it would be in if Congress were to repeal Sec-

tions 11707 and 10730. This Decision places it completely within the carrier's control whether or not to accept full value liability and at what level it wants to limit its liability. The shipper has no say in it, and the released value can be accomplished entirely by the carrier in its tariff (with no written statement of value required of the shipper).

As a rationale for defeating the Congressional intent manifested in these statutory provisions, both the Commission's Decision and the Opinion of the Third Circuit rely upon (1) the general principle that the shipper is bound by the rates and charges in a carrier's tariff (whether or not it has actual notice of them) and (2) a carrier's tariff provision limiting liability to an amount stated therein, even if the shipper makes no declaration of value on the bill of lading[5] (App. A, p. 8, App. B, p. 8). The defect in this rationalization is that it repeals the statute.

As noted, Section 10730(b)(1) allows a limited value recovery only where the "shipper" makes a "written declaration" or a "written agreement" stating the value. And Section 11707(c)(1) states plainly the Congressional intent that the carrier may not limit the "amount of recovery" by a "tariff filed with the Commission", declaring such to be "void"[6] unless the carrier obtains the shipper's written declaration of or agreement to that value. Congress made a significant exception to the general principle of binding the shipper by tariff provisions when it enacted Sections 11707(c)(1) and 10730(b)(1), which provide that a tariff provision may not be used by the

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[5]As expressed in the Third Circuit Opinion: "The I.C.C. determined, and we agree, that a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper." (App. A, at A-8).

[6]Indeed, the purpose of Petitioners in filing a complaint with the Commission was to have automatic release provisions removed from the tariffs as void.

carrier to limit the amount of its damages and that the only way to reach that result is by a specific written declaration or agreement of value by the shipper.

In framing these provisions, Congress is presumed to have been aware of the general principle that the shipper is bound by the carriers' tariffs. The carrier cannot supervene the law by relying upon that general principle to legalize tariff provisions that are specifically made void by statute. *Boston & M.R.R. v. Piper*, 246 U.S. 439, 445 (1918). The statute clearly provides that there must be a written declaration or agreement stating value by the shipper and that a provision in a carrier's tariff purporting to take the place of the declaration is void.

The decision to approve automatic releases on a "constructive agreement" theory cannot be reconciled with either the words or the purpose of Congress in enacting the Carmack Amendment. It amounts to displacing the one statutory requisite — written shipper agreement — with two givens of which Congress already took cognizance in Section 11707 — a bill of lading and a tariff. Constructive shipper knowledge of tariffs cannot be allowed to override the requirement that shippers must execute written releases of the value of their goods for the released value exception to apply.

As the Commission should have known, and would certainly have been told if it had held a proceeding instead of dismissing the Shipper Conferences' complaint summarily, constructive notice is in most cases no notice at all.[7] Most shippers

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[7]See *West Coast Truck Lines, Inc. v. Weyerhauser Co.*, No. 89-35115 (9th Cir., decided January 4, 1990) (1990 Westlaw 155, page 23 of 31): "The ease of filing tariffs and the sheer number filed no longer makes it appropriate to allocate the burden of discovery of the filed rate to the shipper in all cases." If shippers cannot fairly be presumed to know the tariff rate, how can they be presumed to know whether the carrier has adopted an automatic release?

will not learn of the existence of an automatic release in a carrier's tariff until they file a claim for loss or damage, and are told that their recovery is limited to ten cents per pound.

Of course, even if constructive notice were practically effective and legally sufficient (and it is neither), there remains the statutory requirement of a ***written*** shipper declaration or agreement to a released value. Under the ICC Decision, which relies on one line of court cases, this requirement is met by the fact that the shipper signs, or puts its name on, the bill of lading. But this merely serves to establish the existence of a contract of carriage. The law requires a separate agreement, affirmatively accepted by the shipper, in order to invoke the exception to the normal rule of full carrier liability. See *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 134-35 (4th Cir. 1967) and *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428, 432 (2d Cir. 1945).

Indeed, the uniform bill of lading implements the statutory provision by providing a specific section on the bill for the shipper to choose to enter a value. In order for the Commission's Decision to be correct, one would have to accept the propositions (1) that the carriers have a right to override the statutory prohibition against a carrier limitation of value in the tariff and (2) that the shipper, presented with the election of whether or not to insert a value limit in a designated section of the bill of lading, is bound by a value stated in the tariff whether it executes that section or not.

It cannot be overlooked that, if the Commission's conclusion is correct that the carrier-made tariff plus the shipper's signature on the bottom line of the bill of lading are all that are needed to limit the amount recoverable for damages, the carriers would be given the right to limit value unilaterally by their tariffs. This sweeps away the Congressionally-adopted

principle of full value recovery with an exception limited to circumstances where a shipper declares a value. The Decision creates a whole class of bailees who are no longer responsible for the damages to goods in their custody. When it is considered that virtually everything that arrives at a retail store comes by truck, this creates an awesome gap in the law.[8]

In the Third Circuit Decision, 887 F.2d at 445, the court held that the statute is not clear, and therefore proceeded to the second prong of the *Chevron* test — whether the agency adopted a permissible interpretation of the statute — and deferred to the ICC's deference to the court decisions upholding automatic releases. But it is difficult to understand how Congress could have been more clear than it was. Because the ICC Decision cannot be reconciled with the plain meaning of the statute, it must be reversed.

II. THE OPINION OF THE THIRD CIRCUIT IS IN CONFLICT WITH THE OPINIONS OF OTHER CIRCUITS ON THIS SAME ISSUE.

The Commission first considered released values in 1936, soon after motor carriers were placed under its jurisdiction. Its initial decision involving released values was *Released Rates Order MC-1*, an unpublished decision issued January 16, 1936. In order to implement the provisions of the statute, the Commission included this prerequisite for the released values there authorized (emphasis added):

> Note: The value declared in writing by the shipper, or agreed upon in writing as the released value

[8]We estimate the value of the freight shipped by general freight motor carriers at approximately $150 billion per year. A carrier-made tariff limit of 10 cents per pound, as exampled in the Commission's Decision, would limit recovery to only $3 billion [assuming an average real value of $5.00 per pound].

> of the property, as the case may be, *must be entered on Shipping Order and Bill of Lading* as follows:
>
> > The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per pound for each article.[9]

That decision, which plainly read the released value statute as requiring affirmative action by the shipper to declare a value on the shipping order or bill of lading, has been followed by the Commission up until this case. This issue was raised in a series of cases before the Commission over the years and it ruled that automatic releases in a tariff are not allowed. These decisions include *Released Rate Rules — National Motor Freight Classification*, 316 ICC 499, 512-13 (1962); *Released Rates — Small Shipments Tariff*, 361 I.C.C. 405, 413 (1979) ("we shall require shippers to affirmatively release liability") and *Transconex Inc. — General Commodities*, unpublished decision served November 15, 1982,[10] *affirmed without opinion, Drug and Toilet Preparation Traffic Conference v. I.C.C.*, No. 83-1587 (D.C. Cir. 1984).

In the instant Decision, the Commission cited *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977) as evidence that it had not consistently ruled against automatic releases over the years. However, that decision shows no mention or discussion of an automatic release and it was not an issue raised in that case. Whatever faint value might reside in a decision on an issue not raised or discussed is certainly erased by its later decisions, *supra*.

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[9]A copy of Released Rates Order MC-1, along with the appendix to that order showing the above Note, are attached hereto as Appendix E.

[10]A copy of the *Transconex* decision is attached hereto as Appendix F.

While the issue of automatic releases was not discussed in the decision in *Machines*, in every case in which the issue was discussed by the Commission, automatic releases were rejected. Although an agency, even after 50 years of construction, is not precluded from making a new construction of a statute (assuming, *arguendo*, that the statute is unclear), it would have to present a compelling rationale to justify its departure from its settled construction. Here, the Commission not only declined to develop a record on this important issue, but its "new" construction is based simply upon a misreading of judicial precedents as settling the issue beyond question, rather than the deliberate analysis required for a new and diametrically opposite construction of the statute.

The instant Decision of the Commission was based squarely on its erroneous conclusions that as a result of court decisions upholding automatic releases in tariffs "on numerous occasions . . . it is beyond question that inadvertence clauses are lawful under Sections 11707 and 11730"; that "there is no suggestion in any court decision on this issue" to the contrary; and that, because there is a "virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs" (App. B, pp. 3, 4, and 5), it was constrained to dismiss Petitioners' complaint.

There are several problems with this analysis, even aside from the fact that the statute is to the contrary. In the first place, these statements are not statutory analyses, but merely reflect the Commission's limited reading of relevant cases. The Third Circuit erred in giving *any* deference to this aspect of the decision below, since courts can reach legal conclusions based on prior court decisions at least as well as agencies. See *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986), where it is observed that deference under *Chevron* to an agency's attempt to interpret an "admittedly ambiguous" statute "is only appropriate when the agency has

exercised its *own* judgment. When, instead, the agency's decision is based on an erroneous view of the law, its decision cannot stand." (Emphasis in original.) That case involved an agency's misreading of a decision by this Court, and this case involves the ICC's failure to recognize the existence of conflicting authority, but the lesson is the same. *Chevron* deference, which the Third Circuit found controlling herein, was unwarranted.

In the second place, to reach its conclusions as to what it regarded as settled law, the Commission had to overlook or overrule a series of significant judicial decisions to the contrary. Indeed, the tariff item cited as an example[11] of an automatic release in the Decision is the same provision which was at issue in *General Electric Co. v. McLean Trucking Co.*, No. 85-417-A (E.D. Va. 1985). That court held that such a tariff limitation contravenes 49 U.S.C. §§10730 and 11707, because the statute requires that the shipper make a written declaration or agreement. As noted in the Third Circuit's Opinion herein, the Commission rejected the *General Electric* case. (App. A, p. 11).

Decisions by the First, Second, Fourth and Ninth Circuits have considered tariff automatic releases and found them contrary to statute.

In *Anton v. Greyhound Van Lines*, 591 F.2d 103 (1st Cir. 1978), the Court of Appeals for the First Circuit held that a 60 cents per pound value in a tariff item stating that the freight "will be deemed released" to such value is invalid to self limit the carrier's liability. The court held that the shipper must

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[11]That tariff item applies to "used machinery and used agricultural implements" and states that "if consignor fails to declare a released value at time of shipment, shipment will be subject to the lower released value herein" (10 cents per pound) (App. B, p. 2).

take specific action to enter a "voluntary valuation" of its goods. 591 F.2d at 108.

In *Gordon H. Mooney Ltd. v. Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir.), *cert. denied*, 449 U.S. 875 (1980), the court held, as to a motor common carrier, that "unless the valuation was written on the bill of lading, Maislin [the carrier] may not limit its liability under the statute." 616 F.2d at 626. In *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945), the carrier attempted to apply a 30 cents per pound valuation limit from its tariff, but the court held that there needs to be a written declaration by the shipper of that amount. 149 F.2d at 432.[12]

In *Chandler v. Aero Mayflower Transit Company*, 374 F.2d 129, 135 (4th Cir. 1967), the Fourth Circuit observed that a shipper must agree to a released value "in the same sense that one agrees or assents to enter into a contractual obligation," and quoted *Caten v. Salt City Movers & Storage Co.*, 149 F.2d at 432, as follows:

> The statute makes it abundantly clear that the carrier's common law liability for full actual damages, whether or not caused by its negligence, is imposed when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain speci-

[12]In *Mechanical Technology, Inc. v. Ryder Truck Lines*, 776 F.2d 1085, 1089-90 (2d Cir. 1985), one of the cases on which the ICC relied in its Decision, Judge Winter suggested in his separate concurrence that the majority had, *sub silentio*, discarded *Gordon H. Mooney*. However, the majority declined to go so far, stating "we are not convinced that every failure properly to complete the bill of lading would represent a 'fair opportunity' to choose a lower level of liability. 776 F.2d at 1089, n.5. See also *id.* at 1088: "The existence of a tariff is not in itself sufficient to limit liability." Despite these reservations, Petitioners believe *Mechanical Technology* cannot be reconciled with the statute and was wrongly decided.

> fied action by the shipper in respect to a *voluntary valuation of his goods.*

374 F.2d at 135, n.10, emphasis added by the Fourth Circuit.

In the Ninth Circuit, the Court of Appeals similarly held that leaving open the blank on the bill of lading for insertion of value and a tariff provision purporting to limit value are not enough to meet the statutory test for released value. *Mass v. Braswell Motor Freight Lines*, 577 F.2d 665 (9th Cir. 1978). To the same effect is *Thomas Electronics, Inc. v. J.W. Taynton Co.*, 277 F.Supp. 639, 642 (M.D. Pa. 1967) where the court, after noting the blanks for inserting value on the standard bill of lading, concluded:

> Shippers have no legal duty to state the value of their goods on the Bill of Lading and their failure to do so will not destroy the protection afforded them by Section 20(11) of the Interstate Commerce Act.

Accord, *Fine Foliage of Florida, Inc. v. Bowman Transportation, Inc.*, 698 F.Supp. 1566, 1575 (M.D. Fla. 1988).

The ICC Decision cited a few judicial decisions which favored automatic releases (decisions by two district courts and by the Second and Seventh Circuits). However, the cases discussed above do not evidence the unbroken line of precedents which the Decision envisioned as settled law, but a clear conflict among the circuits and among lower courts. Indeed, the weight of authority appears to be against the view which the Commission adopted as "beyond question". (App. B, p. 6). While the Commission is certainly entitled to take its own position on an issue the courts have found divisive, it did not do so in the proceeding below.

This conflict in the cases concerning the lawfulness of automatic releases should be resolved in a context other than that of the private litigation of loss and damage claims which

has resulted in conflicting opinions. Here, the shipping public is represented by two national associations of shippers, the trucking industry is represented, *inter alia*, by the American Trucking Associations, and the ICC is a party. The issues will be fully briefed and argued.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 5, 1990

APPENDIX A

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and The Health and Personal Care Distribution Conference, Inc., Petitioners,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents,

Roadway Express, Inc.; National Freight Claims & Security Council of American Trucking Associations; National Motor Freight Traffic Association, Inc., Intervenors.

No. 89-3163.

United States Court of Appeals,
Third Circuit.
Argued Sept. 7, 1989.
Decided Oct. 10, 1989.

Rehearing and Rehearing In Banc
Denied Nov. 6, 1989.

Associations of companies that were regular shippers petitioned for review of the decision of the Interstate Commerce Commission that tariffs containing inadvertence clauses were not per se illegal. The Court of Appeals, Aldisert, Circuit Judge, held that the decision was proper.

Petition for review denied.

1. Commerce — 161

Where neither the plain language and legislative history of sections of the Interstate Commerce Act nor the case law in-

›ting the sections was clear, Court of Appeals would not ..pret statutory language de novo but was required to determine whether Interstate Commerce Commission's decision was based on a permissible interpretation. 49 U.S.C.A. §§ 10730, 11707.

2. Commerce — 89(2)

Interstate Commerce Commission properly determined that inadvertence clauses in tariffs, providing that shipments will be insured at the lowest rate permited in the tariff if the shipper fails to declare value, were not per se illegal under provisions of the Interstate Commerce Act; inadvertence clause in published tariff, taken together with bill of lading, could constitute a written agreement between carrier and shipper. 49 U.S.C.A. §§ 10730, 11707.

Daniel J. Sweeney (argued) and John M. Cutler, Jr., Washington, D.C. for petitioners.

Virginia Strasser (argued), I.C.C., Robert Burk, Craig M. Keats, Office of Gen. Counsel, John P. Fonte, John J. Powers, III, and James F. Rill, U.S. Dept. of Justice, Appellate Section, Antitrust Div., Washington, D.C., for respondents.

Kenneth E. Siegel (argued), Robert S. Digges, Jr., Alexandria, Va., and William W. Pugh, Gen. Counsel, Nat. Motor Freight Traffic Assn., Inc., Alexandria, Va., for intervenors/respondents.

Before MANSMANN, NYGAARD and ALDISERT, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

In the world of commercial shipping freight by common or contract carrier, as regulated by the Interstate Commerce

Commission ("I.C.C. or Commission"), the shipper ordinarily declares the freight's value in the bill of lading. Some tariffs filed with the I.C.C. contain a clause providing that if the shipper fails to declare a value, the shipment will be insured at the lowest rate permitted in the tariff. This is commonly known as the "inadvertence clause."

The question for decision in this petition for review of an order of the Commission, by National Small Shipments Traffic Conference, Inc., and the Health and Personal Care Distribution Conference, Inc. ("Petitioners"), is whether the Commission properly decided that tariffs containing inadvertence clauses are not per se illegal. We hold that the Commission did not err, and therefore, deny the petition for review.

Jurisdiction was proper in the Interstate Commerce Commission based on 49 U.S.C. § 17. Jurisdiction on appeal is proper based on 28 U.S.C. §§ 2321(a), 2342(5). The petition was timely filed under Rule 4(a), F.R.App.P.

I.

The petitioners are associations of approximately 300 companies that are regular customers of the general freight trucking industry. They filed a complaint with the Commission seeking to have tariff provisions containing "automatic release" or "inadvertence clauses" declared void.

They claim that provisions, such as those contained in Item 3010-C of Roadway Express Tariff 301-C, I.C.C. RDWY 301-C, are per se violations of sections 11707 and 10730(b) of the Interstate Commerce Act ("Act"). 49 U.S.C. §§ 10730, 11707. The Roadway Express Tariff provides:

> a. Commodities as described above, other than new will be accepted for transportation by carrier subject to the following:

(1) Released to value exceeding $.10 per pound . . . 85% of applicable Class Rates.

(2) Released to value exceeding $.10 per pound, but not exceeding $1.00 per pound . . . 95% of applicable Class Rates.

(3) Released to value exceeding $1.00 per pound, but not exceeding $2.50 per pound . . . 97% of applicable Class Rates.

(4) When consignor declares actual value exceeding $2.50 per pound, shipment will be rated at . . . 150% of applicable Class Rates.

2. If consignor fails to declare a released value at the time of shipment, shipment will be subject to the lowest released value herein.

3. Failure of the consignor to declare that commodity as "used" shall not alter the application of this item.

Brief for Petitioner at 7-8.

Petitioners' attack centers on Item 2, commonly known as the "inadvertence clause." If such a clause is present in a tariff, and a shipper fails to declare a value in the bill of lading, then the shipper is insured at the lowest rate permitted in the tariff. The shipper also generally pays for shipping at the lowest rate permitted in the tariff. The tariff is not part of the bill of lading. It is a separately published statement that is incorporated by reference into the bill of lading.

The I.C.C. considered and rejected petitioners facial challenge to tariffs containing inadvertence clauses. The Commission held that *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977), and numerous other decisions, made clear that "including an inadvertence clause in a released rates tariff is [not] a proper basis for finding the tariffs

. . . unlawful and ordering them cancelled." *National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc. v. Consolidated Freightways Corp. of De.*, No. MC-C-30102, at 4 (I.C.C. Jan. 13, 1989) [hereinafter *"I.C.C. Op."*].

II.

Like most administrative appeals, this case turns on the standard of review. The Supreme Court in *Chevron U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) held:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguous expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. at 2781-82 (footnotes omittted).

Before us petitioners reassert the argument they made before the Commission that inadvertence clauses are per se illegal based on sections 10730(b) and 11707 of the Act. 49 U.S.C. §§ 10730(b), 11707. They argue that the language and legislative intent of Congress in enacting these sections is clear,

and that therefore, this court is constrained to follow that clear intention and declare tariffs containing inadvertence clauses void.

[1] We do not share petitioners' view that there is a pristine clarity to sections 10730 and 11707. Neither the plain language, and its legislative history, nor case law interpreting these sections is clear. Accordingly, we do not interpret the statutory language *de novo*, but are required to determine whether the agency's answer is based on a "permissible interpretation" of the statute. *Chevron*, 467 U.S. 843, 104 S.Ct. at 2782.

Our starting point is the statutory language:

> (b)(1) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier providing transportation . . . [may] establish rates for the transportation of property (other than household goods) under which the liability of the carrier . . . is limited to a value established by written declaration of the shipper or by written agreement between the carrier . . . and shipper if that value would be reasonable under the circumstances surrounding the transportation. (2) Before a carrier . . . may establish a rate for any service under paragraph (1) of this subsection, the Commission may require such carrier . . . to have in effect and keep in effect, during any period such rate is in effect under such paragraph, a rate for such service which does not limit the liability of the carrier. . . .

49 U.S.C. § 10730.

> (a)(1) A common carrier providing transportation or service . . . shall issue a receipt or bill of lading for the property it receives for transportation under this subtitle . . . [and is] liable to the person entitled to

> recover under the receipt or bill of lading . . . [for] the actual loss or injury to the property. . . .
>
> (c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.
>
> * * * * * *
>
> (4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

49 U.S.C. § 11707.

III.

The petitioners present a series of arguments to support their position. We have considered each contention and conclude that most do not require extensive discussion.

A.

They argue that section 11707(c)(1) expressly prohibits tariff liability disclaimers. But the plain language of that section prohibits only those tariff disclaimers that are in violation of section 11707. By implication, it would, therefore, follow in logical order that this subsection endorses tariff disclaimers that comply with section 11707. This is a classic example of a disjunctive syllogism. Either A or B; but not A; therefore, B. Or as the statute provides: a carrier may not limit liability except as permitted in this subsection; a limitation of liability in violation of § 11707 is void, therefore, a limitation of liability consistent with the regulations of § 11707 is valid. *See* R.

ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 163 (1989).

Alternatively they contend that when read together, sections 10730 and 11707 require that any release of liability be "established by written declaration of the shipper, or by a written agreement," and the publication of an inadvertence clause in a tariff does not satisfy the requirements of a written agreement. The I.C.C. determined, and we agree, that a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper. *I.C.C. Op.* at 3. This determination was premised on the long-standing principle that a shipper is deemed to be aware of, and agrees to be bound by, the tariff under which it is shipping, and that before carriage can begin, the parties enter into a contract of carriage embodied in a bill of lading. Neither the language, nor legislative history of sections 10730 or 11707 prohibit such an interpretation.

B.

Petitioners then argue that the legislative history of the statute clearly prohibits inadvertence clauses. Petitioners begin by outlining the development of the common law rule of full liability for carriers. *See Coggs v. Bernard*, 2 Ld.Raym. 909, 92 Eng. Rep. 107 (1703). This rule was codified in 1906 in the Carmack Amendment (currently codified at 49 U.S.C. § 11707) which prohibited carriers from limiting their liability in any way. But the courts loosened this requirement and allowed shippers to declare the value of their goods and be charged lesser rates for goods of lesser value. After this occurred, carriers began charging exorbitant rates for shipments insured at full value. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 509, 33 S.Ct. 148, 153, 57 L.Ed. 314 (1913). This prompted swift Congressional reaction. Congress enacted the Cummings Amendment (now codified primarily at 49 U.S.

§ 10730), which allowed carriers to limit their liability, but gave the I.C.C. the power to approve rates. By 1980, the requirement of I.C.C approval of tariff rates was removed by the Motor Carrier Act. Petitioners advance the theory that the 1980 Motor Carrier Act in effect rolled back the law to *Adams Express*. From these premises they argue that limitation of liability by the carrier can be brought about only when the shipper declares the value of the goods. We reject this theory for several reasons. First, there is no indication that at the time of *Adams Express*, our courts were ever introduced to, or discussed, inadvertence clauses. Second, there is nothing in the language or legislative history of the 1980 Motor Carrier Act which indicates that Congress even thought about the validity of automatic release clauses. *See generally*, H.R.Rep. No. 1069, 96th Cong., 1st Sess. 1-103, *reprinted in* 1980 U.S. Code Cong. & Admin.News 2283-2338. Third, we are satisfied that Congress intended to authorize the Commission to approve released rate provisions, and left the question of inadvertence clauses as one properly for the Commission to resolve in filling in the gaps implicitly or expressly left by Congress. *See Drug & Toilet Preparation Traffic Conf., Inc. v. United States*, 797 F.2d 1054, 1058 (D.C.Cir.1986).

Indeed, Congress has delegated to the I.C.C. broad discretion in dealing with tariffs, *see* 49 U.S.C. § 10762 (I.C.C. prescribes requirements for tariffs), and value limitations, 49 U.S.C. § 10730(b) (requires that limited value be reasonable, a determination that is left to the I.C.C. under section 10701). The Administrative Procedure Act provides that when an agency is given discretion to make a decision, it can only be overturned if it is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

IV.

[2] We conclude that the I.C.C. did not err in concluding that inadvertence clauses in tariff provisions are not per se illegal. The Commission applied basic contract laws and determined that the presence of such a clause in a published tariff, taken together with a bill of lading, may constitute a written agreement.

A.

Petitioners' primary response to the I.C.C.'s written agreement concept is to contend that such a practice was not permitted at common law. Brief for petitioners at 25, 29. This argument lacks merit. We do not examine here isolated fundamentals of common law tort liability of centuries past. We are looking at contract limitations to tort liability that are also recognized at common law. We are looking also at the gloss applied by federal statutes and I.C.C. regulations over the years. *See e.g., Ruston Gas Turbines, Inc. v. Pan American World Airlines*, 757 F.2d 29, 32 (2d Cir. 1985) (court upheld the validity of an inadvertence clause contained in a tariff finding that the shipper made a "fair, open, just and reasonable agreement").

Moreover, the Commission's decision was consistent with recent decisions holding that where a tariff contained an inadvertence clause, the parties had in reality entered into a written agreement. *E.g., Mechanical Technology, Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085 (2d Cir.1985); *W.C. Smith, Inc. v. Yellow Freight Systems, Inc.*, 596 F.Supp. 515 (E.D. Pa.1983). The Commission noted that the petitioners here participated in another proceeding before the Commission, *Machines, Data Processing, Classification Ratings* 353 I.C.C. 661 (1977). In that case these same petitioners supported adoption of a released rates provision that contained an in-

advertence clause. The released rates provision at issue in this case was patterned after the released rates provision in *Machines. See I.C.C. Op.* at 4-5.

B.

Petitioners ask that we reject the I.C.C. decision in this case and all other authority condoning inadvertence clauses. They assert that this line of cases was incorrectly decided and should be abandoned. Petitioners advocate adopting the teachings of *General Electric Co. v. McLean Trucking Co.*, C.A. No. 85-0417-A (E.C.Va.1985) (unpublished) (Brief for National Motor Freight Traffic Assoc., appendix G). We reject petitioners' argument. We note that the *General Electric* case has not been followed by most courts, *see e.g., Mechanical Technology, Inc.*, 776 F.2d 1085; *W.C. Smith*, 596 F.Supp. 515. More importantly, this court does not meet this issue *ab initio*. We lack the authority to make a *de novo* review of the issues presented. The Commission rejected the *General Electric* case, and the only question before us is whether the I.C.C.'s rejection was permissible. We hold that it was.

V.

Petitioners final argument is that the Commission's decision should be reversed because it indicates a departure from the previous I.C.C. policy of discouraging inadvertence clauses. Brief for petitioner at 20-24 (*see e.g., Loss and Damage Claims*, 340 I.C.C. 515, 522 (1972) (released rates must be agreed to in a written declaration)). However, it is well-settled that:

> [r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither supposed to regulate the present and the future with-

in the inflexible limits of yesterday.

American Trucking Assocs. v. Atchison, Topeka and Santa Fe Ry. Co., 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967). That the I.C.C. may have changed its position on this issue does not constitute reversible error under our limited standard of review.

VI.

We have carefully considered all contentions presented by the petitioner, but settled law dictates that the reviewing court may not impose its own construction of a statute when the agency administering that statute has previously construed it. Our role here is to determine whether the agency's determination "is based on a permissible construction of the statute." *Chevron* 467 U.S. at 843, 104 S.Ct. at 2782. We conclude that it was. The Commission's decision on inadvertence clauses was within its discretion to address as a function of "filling in the gaps of Congressional authorization." *Id.*

Accordingly, the petition for review will be denied.

APPENDIX B

SERVICE DATE
JAN 23 1989

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30102

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE, INC.

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, *ET AL.*[1]

Decided: January 13, 1989

National Small Shipments Traffic Conference, Inc. and Drug and Toilet Preparation Traffic Conference, Inc. (complainants) seek a finding that certain tariff provisions published by 10 motor carriers purporting to limit liability violate 49 U.S.C. 10730 and 11707 and should be ordered canceled.

Howard's, Walsh, Hyman, Midland, Ward, and New Penn move to dismiss the complaint against them. Complainants replied to the New Penn, Walsh and Ward motions and consented to dismissing the complaint against Walsh and Ward. Roadway filed an answer to the complaint and interposed an affirmative defense that the complaint fails to state a claim upon which relief may be granted. Red Star Express Lines, Red Star Express Lines of Quebec, and Consolidated Freightways did not file answers.

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[1]The other carrier defendants are Hyman Freightways, Inc., Howard's Express, Inc., Midland Transport, Ltd., New Penn Motor Express, Inc., Red Star Express Lines, Red Star Express Lines of Quebec, Roadway Express, Inc., Walsh Trucking Service, Inc., and Ward Trucking Corp.

PROCEDURAL MATTERS

By pleading filed October 7, 1988, complainants seek to amend the complaint to add four new carrier defendants. We will deny complainants' request to amend the complaint.[2] The addition of new parties now will result in needless and unnecessary delay in the disposition of this proceeding. Moreover, inasmuch as complainants raise purely legal issues, adding defendants to the proceeding would not help us to reach a more informed decision or lead to a different result. The complaint as originally filed seeks cancellation of certain tariff items maintained by defendants and any other similar tariff items published by defendants which contain "automatic" releases of liability. Adding new defendants and additional tariff items will not alter the legal issues presented by the complaint.

Also, on October 5, 1988, complainants submitted a reply to an earlier motion to dismiss filed by Midland. Although the reply is a late-filed pleading, we will admit it to the record.

In view of our ultimate decision to dismiss the complaint against all remaining defendants for failure to state a claim upon which relief may be granted, we will not fully discuss or rule upon all the motions to dismiss.

BACKGROUND

Complainants contend that the various defendants have published specified tariff provisions that purport to impose "automatic" releases of dollar liability limits on shipments where shippers have not provided their agreement to do so

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[2]One of the four carriers sought to be added as defendants filed a pleading requesting dismissal of the motion to amend the complaint, and complainant replied. In view of our decision to deny the motion to amend the complaint, we will not discuss these pleadings.

in writing. (These releases prompt use of the phrase "released rates" to describe the tariff items. In return for "releasing" the value of the goods for liability purposes to a lower level, shippers obtain lower rates for the transportation.) Complainants cite, as illustrative, Item 3010-C of Roadway Express Tariff 301-C, ICC RDWY 301-C, which provides as follows:

> Item 3010-C
> *Used Machinery and Used Agricultural Implements*
> (1) Exceptions to the following commodities named in Tariff ICC NMF100 series:
>
> > Agricultural Implements or Parts as described in NMFC Items 8900 through 11622; [E8900-00] [X30]
> > Machinery Group as described in NMFC Items 114000 through 133454. [E11400-00] [X20]
>
> a. Commodities as described above, other than new will be accepted for transportation by carrier subject to the following:
>
> (1) Released to value not exceeding $.10 per pound. . . . 85% of applicable Class Rates.
>
> (2) Released to value exceeding $.10 per pound, but not exceeding $1.00 per pound. . . . 95% of applicable Class Rates.
>
> (3) Released to value exceeding $1.00 per pound, but not exceeding $2.50 per pound. . . . 97% of applicable Class Rates.
>
> (4) When consignor declares actual value exceeding $2.50 per pound, shipment will be rated at. . . . 150% of the applicable Class Rates.

2. If Consignor fails to declare a released value at time of shipment, shipment will be subject to the lowest released value herein .

3. Failure of the consignor to declare that commodity as "used" shall not alter the application of this item.

Complainants center their attack on item 2, commonly known as the "inadvertence clause." This clause applies the lowest released value specified in the tariff if the shipper fails to declare one of the higher released values at the time of the shipment. Complainants assail such items as violations of 49 U.S.C. 10730, which allows a carrier to limit its liability to a value "established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." Absent a requirement in the tariff for an express written agreement by the shipper, complainants assert that the assailed provisions are unlawful and must be ordered canceled. In support of their position, they cite an unprinted decision of the United States District Court for the Eastern District of Virginia, Alexandria Division, in C.A. No. 850417-A, *General Electric Company and Insurance Company of North America* v. *McLean Trucking Company* (Oct. 17, 1985) (*G.E.*)

All the responding defendants state that their tariffs do not violate 49 U.S.C. 10730. Some argue that their tariffs do not contain inadvertence clauses, while one (Howard's) notes that its tariff was established at the request of the sole shipper to which it applies. Legally most significant, however, are the answer of Roadway, and the motions to dismiss filed by Midland and Howard's. These respondents ask that the complaint be dismissed in light of several Commission and court decisions authorizing inadvertence clauses affer finding that the tariffs and the relevant bills of lading, taken together, did indeed constitute a "written agreement" and provide the ship-

per with a choice of liability levels. Indeed, Howard's points out that its tariff is similar to classification provisions approved by the Commission with the full support of complainants in *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977) (*Machines*). The *Machines* tariff was later found to be lawful in all respects in *Mechanical Technology Inc.* v. *Ryder Truck Lines*, 776 F.2d 1085 (2d Cir. 1985), (*Mechanical*). NASSTRAC in reply asserts that (1) many bills of lading do not clearly inform shippers of the consequences of failing to make an election; and (2) in any event, the act prohibits any tariff "forcing a shipper . . . to read all the print on [the] bills of lading and then . . . . take an affirmative step to retain full value coverage . . . ." Reply to Motion to Dismiss of Midland Transport Limited at 5. The court cases holding that various tariffs and bills of lading, taken together, adequately insulated the carrier from full value liability are, according to NASSTRAC, irrelevant to "[t]he essence of this proceeding, [which is] whether . . . it is unlawful [for any tariff] to impose an automatic release on the shipper." *Ibid.*

DISCUSSION AND CONCLUSIONS

49 U.S.C. 11707(c)(4) provides that a common carrier may limit its liability for loss of or injury to property transported under section 10730. Section 10730(a) allows a common carrier:

> to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the transportation.

Otherwise, the statute provides that the motor carrier is liable up to the full value for any loss or damage to a shipment it

handles. 49 U.S.C. 11707(a)(1).

Complainants contend that defendants' tariff items impose automatic releases, without a specific declaration of value by the shipper, and are therefore unlawful because the shipper has not agreed in writing to these limits. They argue that a released rate item properly is one that provides for the application of a specific rate on a shipment only where a shipper affirmatively declares the value on the bill of lading and thus establishes the valuation for loss and damage purposes. According to complainants, there is no room in the law for an inadvertence clause.

Complainants' facial attack on tariffs containing so-called "automatic releases" of liability must be rejected. Their position has been examined on numerous occasions by the courts and found wanting. Stated simply, it is beyond question that inadvertence clauses are lawful under sections 11707 and 11730.

The tariffs complainants challenge are patterned after the released rates provisions approved in *Machines, supra*. Not only did complainants participate in that proceeding, they supported adoption of the released rates authorized there which included an inadvertence clause. *Id.* at 664. As complainants undoubtedly are aware, inadvertence clauses are regularly included in released rates tariff approved by the Commission to allow carriers to assign a classification when the shipper has failed to declare a value for its shipment to trigger application of a listed released value. These clauses are generally established to protect the carrier when it is tendered commodities of extremely high value. As the Commisssion observed in *Machines*, claims for loss and damage of these commodities "could be extremely harmful to large carriers and catastrophic to small carriers." 353 I.C. at 670. Without an inadvertence clause, shippers would be able unilaterally to im-

pose full liability on a carrier by choosing not to declare a shipment's value under a released rate tariff. Such a result would defeat the carrier's right to know the extent of its potential liability for loss and be compensated in proportion to the risk assumed. *Shippers National Freight Claim Council Inc.* v. *Interstate Commerce Commssion*, 712 F.2d 740, 746 (2d Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).[3] An inadvertence clause preserves the rights of both the carrier and shipper under a released rates tariff. It in no way eliminates the shipper's right to declare a shipment's value for liability purposes.

Numerous cases have upheld the legality of inadvertence clauses under sections 11707 and 11730. In *W.C. Smith, Inc.* v. *Yellow Freight Systems, Inc.*, 596 F.Supp. 515 (E.D. Pa. 1983) the court specifically ruled on the question of whether the written agreement requirements of section 11730 were satisfied where the tariff contained an inadvertence clause and that shipper failed to declare a released value on the bill of

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[3]Indeed, in *Machines*, the Commission approved the released rates tariff at issue, with the support of complainants here, without even addressing the automatic release provision. And any prior Commission statements categorically criticizing automatic release in *Released Rates on Small Shipments Tariff*, 361 I.C.C. 405, 413 (1979) (automatic releases can be a "trap for the unwary"), do not represent current Commission policy and indeed may contravene the statute as interpreted in numerous subsequent court decisions. Unlike the line of cases finding it an "unreasonable practice" under 49 U.S.C. 10701(a) for a carrier to charge a higher tariff rate because the shipper failed to comply with the purely technical notation requirement on the bill of lading that it performed the loading, counting and unloading of the freight, here the released value designation spaces and inadvertence clauses are a substantive means of establishing liability. The Commission will generally enforce a tariff endorsement or notation requirement where it serves some purpose related to the transportation provided, and is not otherwise unlawful. As noted above, these inadvertence clauses serve a legitimate purpose and are necessary to assign liability. The intent of released rates (*i.e.*, a lower rate in return for assumption of some liability) would be defeated if the shipper, simply by failing to state a value, obtained both a lower rate and full carrier liability.

lading. The court found that the necessary written agreement existed because the shipper agreed to be bound by the terms of the tariff when it chose not to exercise its right to declare a released value. *Id.* at 517.

There is no suggestion in any court decision on this issue that including an inadvertence clause in a released rates tariff is a proper basis for finding the tariffs assailed by complainants to be unlawful and ordering them canceled. Even the *G.E.* case cited by complainants (which involved factual circumstances that the court found compelling and which, we note, other courts have not followed) was premised not on the propriety of the tariff itself but on the court's conclusion that the particular bill of lading used there did not provide for a written agreement. Other cases, which have viewed the released rates provisions of the Act far differently from the *G.E.* court, have found both that the tariffs were lawful and that the particular bills of lading involved satisfied the "written agreement" requirement. *See, e.g., W.C. Smith, Inc.* v. *Yellow Freight Systems, Inc., supra; Mechanical; Cooperative Shippers, Inc.*, v. *Atchison, T. & S.F. Ry.*, 840 F.2d 447 (7th Cir. 1988). Most recently in *Digital Equipment Corp.* v. *Salvage Discount, Inc., et al.*, Civil No. 87-442-G (M.D. N.C., filed August 12, 1988), defendant's motion for summary judgment was granted when a shipper challenged the inadvertence clause at issue in *Mechanical.*

In view of this virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs, we must dismiss complainant's facial attack on their use in defendants' tariffs. Unlike some litigation where a shipper claims that the clause has been misused or its existence has been concealed, here complainants argue that the mere presence of what they term "automatic releases" invalidates the tariffs of defendants and others. For the reasons outlined above complainants have failed to state a claim upon which relief may be granted and

their complaint must be dismissed.

One other matter deserves comment. Defendant Midland maintains that this Commission lacks jurisdiction over its tariff items because it is a Canadian domiciliary. In view of our findings above, it will not be necessary to address that issue in this proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request to amend the complaint is denied.

2. The complaint is dismissed.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3163

National Small Shipments, etc.,

Petitioners

vs.

United States of America,

Respondent

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COEN, NYGAARD, AND ALDISERT,* *Circuit Judges*.

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Las Mansmann
Circuit Judge

*Senior Judge Aldisert was limited to voting only for panel rehearing.

Dated: November 6, 1989

APPENDIX D

NATIONAL MOTOR FREIGHT CLASSIFICATION 100-P

RULES

STRAIGHT BILL OF LADING — SHORT FORM

ORIGINAL — NOT NEGOTIABLE
(To be printed on white paper)

Shipper's No.
Carrier's No.

(Name of Carrier) (SCAC)

RECEIVED, subject to the classifications and lawfully filed tariffs in effect on the date of the issue of this Bill of Lading.

At 19

From

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subjected to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classification in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classification or tariff, if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to

(The Collect on Delivery shipments, the letters "COD" must appear before consignee's name or as otherwise provided in Item 430, Sec. 1.)

(Mail or street address of consignee — For purposes of notification only.)

Destination State County

Delivery Address (*To be filled in only when shipper desires and governing tariffs provide for delivery thereat.) Zip

Route

Delivering Carrier Car or Vehicle Initials No.

No. Packages	0 HM	Kind of Package, Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column

Subject to Section 7 of Condition of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of consignor)

If charges are to be prepaid, write or stamp here: "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Carrier

Per

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$

(This statement may also be used to comply with the law requires that the bill of lading shall state whether charges are "prepaid" or "collect.")

Note — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

Shipper Agent

Per Per

Permanent post office address of shipper

0Mark with "X" to designate Hazardous Materials as defined in the Department of Transportation Regulations governing the transportation of hazardous materials. The use of this column is an optional method for identifying hazardous materials on bills of lading per Section 172.201(a)(10) of Title 49 Code of Federal Regulations. Also, when shipping hazardous materials, the shipper's certification statement prescribed in Section 172.204(a) of the Federal Regulations must be indicated on the bill of lading, unless a specific exception from this requirement is provided in the Regulations for a particular material.

APPENDIX E

RELEASED RATES ORDER MC NO. 1

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 16th day of January, A.D. 1936

The Commission having been petitioned on behalf of various motor carriers for authority to establish and maintain for the transportation of carpets and carpeting, graphite crucibles, hides, pelts or skins not dressed nor tanned, household goods, jeweler's sweepings, leather scrap, leatherboard scrap, ores, paintings and pictures, pottery, chinaware, earthenware, porcelainware or stoneware, printed matter, silk, raw, spun, schappe, or thrown, including organzine, singles, tram, warp, or yarns, watches and clocks, classification ratings dependent upon the released value of the property transported, and the matter having been considered and good cause therefor appearing:

It is ordered, That all motor carriers and their duly authorized agents or the duly accredited successors of such agents, be, and they are hereby, authorized to establish and maintain by filing and posting in the manner prescribed in Sections 217 and 218 of the Motor Carrier Act, 1935, truck-load and less-truck-load classification ratings for carpets and carpeting; graphite crucibles, hides, pelts, or skins not dressed nor tanned; household goods; jeweler's sweepings; leather scrap; leatherboard scrap; ores not otherwise indexed in the classification; paintings and pictures; pottery, chinaware, earthenware, porcelainware or stoneware, not otherwise indexed in the classification; printed matter; silk, raw, spun, schappe, or thrown, including organzine, singles, tram, warp, or yarns; watches and clocks, dependent upon the released value of the property declared by the shipper in writing, or agreed upon in writing, as set forth in the appendix attached to and made a part of this order.

It is further ordered, That changes may be made in any rating and container or packing specification established under authority of this order, but no change in commodity description or in the released valuations upon which the ratings are dependent may be made without specific authority of the Commission.

The Commission does not hereby approve the lawfulness, except under Section 219 of the Motor Carrier Act, 1935, and paragraph 11 of Section 20 of the Interstate Commerce Act, of any ratings or valuations which may be filed under this authority.

It is further ordered, That the ratings dependent upon released value filed under the authority of this order shall show in connection therewith the following notation:

> "Ratings herein based on released value have been authorized by the Interstate Commerce Commission in Released Rates Order MC No. 1, of January 16, 1936, subject to complaint."

By the Commission, Division 5.

GEORGE B. McGINTY

APPENDIX TO RELEASED RATE ORDER MC NO. 1

Carpets or Carpeting:

Rugs, N.O.I., value declared in writing by the shipper, or agreed upon in writing as the released value of the property in accordance witih the following (See Note 2):

If not exceeding $125.00 per 100 lbs., in burlapped bales or roll or in boxes, or wrapped in bundles, see Note 1 below.

If exceeding $125.00 per 100 lbs., and not exceeding $200.00 per 100 lbs., in boxes, see Note 1 below.

If exceeding $300.00 per 100 lbs., in boxes, see Note 1 below.

Note 1— The value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

"The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ---------- per 100 lbs."

Note 2— If consignor declines to declare the value, or agree to released value in writing, shipment will not be accepted.

Hides, Pelts or Skins, not dressed nor tanned:

Hides, Pelts or Skins, not dressed nor tanned, N.O.I.: Dry, See Note below, in packages:
Released to value not exceeding $1.50 per pound
Released to value exceeding $1.50 per pound but not exceeding $5.00 per pound ----------
Released to value exceeding $5.00 per pound but not exceeding $7.50 per pound ----------
If declared or released value exceeds $7.50 per pound or shipper declines to declare or release value, NOT TAKEN.

Note— The value declared in writing by the shipper or agreed upon in writing as the released value of the property as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ---------- per pound for each article.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted.

APPENDIX F

SERVICE DATE
NOV 15 1982

INTERSTATE COMMERCE COMISSION

RELEASED RATES DECISION NO. FF-305
TRANSCONEX, INC. – GENERAL COMMODITIES

Decided OCT 21 1982

By Released Rates Application No. FF-455, Transconex, Inc., seeks authority to establish and maintain released rates on general commodities released to a value not exceeding $50 per shipment, unless a greater value is declared at time of shipment, subject to an additional charge of one percent of such declared value. The authority is sought to apply between Transconex's terminals located at inland points at Jacksonville and Maimi, FL and points and places in Puerto Rico and the U.S. Virgin Islands. Publication is to be made in tariffs to be filed with the Interstate Commerce Commission.

There were two protests to granting this application, one filed by the National Small Shipments Traffic Conference (NSSTC) and the other by the Drug and Toilet Preparation Traffic Conference (DTPTC). Both protested the proposed automatic release. They believe that a release of the carrier's liability must be accomplished by an affirmative act or it becomes a trap for the unwary.

WE FIND:

The sought authority is justified since it will enable shippers to choose whether they wish lower rates and greater claim exposure or higher rates and full carrier liability. However, the applicant seeks an "automatic release" of its liability which could result in a limitation of Transconex's liability for loss or damage without any actual notice to the shipper. The Commission considered such a provision in Ex Parte No. MC-98 (Sub 2) *Released Rate — Small Shipments Tariff*, 361

ICC 404, 415-417, and found it unjustified even in connection with small shipments. Therefore it will be denied. This means that Transconex, Inc. must obtain an actual written release from shippers.

The proposed released value provisions have also been revised to clarify that the released values apply either for an entire shipment or part of a shipment but not more than the actual loss or damage.

WE ORDER:

Transconex, Inc. is authorized to establish and maintain released rates on general commodities from inland points in Jacksonville and Miami, FL to points and places in Puerto Rico and the U.S. Virgin Islands, insofar as the Commission has authority to do so, by publishing the following provisions in its tariff or tariffs publishing rates on the subject traffic:

> Rates in this tariff are subject to a value declared in writing by the shipper or agreed upon in writing as the released value of the property of $50 per shipment, unless a greater value is declared at the time of shipment, subject to an additional charge of one percent of such higher declared value. The declared or released value shall apply to all or any part of a shipment but not more than the actual loss or damage.
>
> Rates herein based on released value have been authorized by the Interstate Commerce Commission in Relesaed Rates Decision No. FF-305 of OCT 21 1982, subject to complaint or suspension.

The Commission does not hereby approve the lawfulness, except under 49 USC 10730 and 11707, of any rate which may be established under the authority of this order.

By the Commission, Released Rates Board, Members Llewellyn, Simmons and Langyher.

Agatha L. Mergenovich
Secretary

No. 89-1255

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL FREIGHT CLAIM & SECURITY COUNCIL

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The Interstate Commerce Act provides that a motor common carrier may limit its liability for injury to or loss of a shipper's property "to a value established * * * by written agreement between the carrier * * * and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 10730(b)(1). The question presented is whether the Interstate Commerce Commission engaged in a "permissible construction of the statute" (*Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)) in determining that a bill of lading, together with a filed tariff that fixes a limited value for goods shipped under that tariff, may in some circumstances constitute a written agreement establishing a limited value within the meaning of Section 10730(b)(1).

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OCTOBER TERM, 1989

No. 89-1255

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., PETITIONERS

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL FREIGHT CLAIM & SECURITY COUNCIL

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 887 F.2d 443. The opinion of the Interstate Commerce Commission (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1989, and a petition for rehearing was denied on November 6, 1989. The petition for a writ of certiorari was filed on February 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Statutory Background

A motor common carrier [1] may "establish rates for the transportation of property * * * under which the liability of the carrier * * * for [loss or injury to] such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier * * * and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 10730 (b)(1). The carrier is fully liable for loss or injury to the transported property in the absence of such an arrangement with the shipper. 49 U.S.C. § 11707(a), (c).

A carrier's rates reflect the extent of its liability for loss or injury to the shipper's property: the shipper will pay a lower rate if the carrier's liability is limited. "The arrangement releasing the carrier from a portion of its liability in exchange for a lower transportation rate is commonly referred to as a 'released rate' or a 'released value rate.'" *Shippers National Freight Claim Council, Inc.* v. *ICC*, 712 F.2d 740, 742 (2d Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

Every shipment transported by a motor common carrier is accompanied by a bill of lading, which is a contract between the carrier and the shipper. Pet. App. A8; see also *id.* at D1 (bill of lading form). The bill of lading typically cautions that "[w]here the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared

---

[1] A motor common carrier is "a person holding itself out to the general public to provide motor vehicle transportation for compensation." 49 U.S.C. § 10102(14).

value of the property," and provides a space for the shipper's declaration of value. Pet. App. D1. The bill of lading also incorporates the terms of the tariff setting forth the rate charged by the carrier: "a shipper is deemed to be aware of, and agrees to be bound by, the tariff under which it is shipping." *Id.* at A8.

This case concerns the facial validity of a provision commonly included in released rate tariffs—the "inadvertence clause." Such a clause "applies the lowest released value specified in the tariff if the shipper fails to declare one of the higher released values [or the actual value] at the time of the shipment." Pet. App. B4; see *id.* at A3-A4. Thus, "[i]f such a clause is present in a tariff, and a shipper fails to declare a value in the bill of lading, then the shipper is insured at the lowest rate permitted in the tariff. The shipper also generally pays for shipping at the lowest rate permitted in the tariff." *Id.* at A4.

B. Proceedings Below

Petitioners—trade associations representing shippers that are customers of the general freight trucking industry—filed a complaint with the ICC seeking a determination that inadvertence clauses are *per se* unlawful under Sections 10730(b) and 11707 of the Interstate Commerce Act. The Commission dismissed the complaint, holding that "it is beyond question that inadvertence clauses are lawful under sections 11707 and [10730]." Pet. App. B6. The Commission rested its decision on a "virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs." *Id.* at B8.

"Without an inadvertence clause," the ICC explained, "shippers would be able unilaterally to impose full liability on a carrier by choosing not to de-

clare a shipment's value under a released rate tariff. Such a result would defeat the carrier's right to know the extent of its potential liability for loss and be compensated in proportion to the risk assumed. An inadvertence clause preserves the rights of both the carrier and shipper under a released rates tariff. It in no way eliminates the shipper's right to declare a shipment's value for liability purposes." Pet. App. B6-B7 (footnote and citation omitted).

The Commission distinguished cases in which a shipper disputed the application of an inadvertence clause on grounds of misuse or concealment in the particular circumstances of a transaction, observing that petitioners' argument was that the "mere presence" of an inadvertence clause invalidated a tariff. The ICC limited its decision to rejecting this "facial attack" on the use of such clauses. Pet. App. B8.

The court of appeals affirmed the Commission's determination. Pet. App. A1-A12. It agreed with the Commission that "a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute [the] written agreement between the carrier and shipper" required by Section 10730(b). Pet. App. A8. The court concluded that the ICC's dismissal of petitioners' complaint was "based on a permissible construction of the statute" and should therefore be upheld. *Id.* at A12, citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

ARGUMENT

Petitioners assert (Pet. 6-7) that the decision below works a dramatic change in the law, unsettling clear standards regarding the means by which a shipper accepts a released value rate. In fact, as both the ICC (Pet. App. B6) and the court of appeals (*id.* at A10-A11) recognized, inadvertence clauses have

been utilized in released value tariffs for many years. Moreover, petitioners' argument that a released value may never be based upon an inadvertence clause was rejected by the Second Circuit in a decision issued five years ago. See *Mechanical Technology Inc.* v. *Ryder Truck Lines, Inc.*, 776 F.2d 1085 (2d Cir. 1985). Petitioners' claimed conflict among the courts of appeals simply does not exist: no court has ever endorsed the *per se* rule espoused by petitioners.

The decisions below thus plow no new ground. Indeed, because the Commission's decision is limited to the facial validity of inadvertence clauses, and does not address the circumstances in which such clauses may in fact be invoked, the question presented in this case is exceedingly narrow. Because there is no conflict among the courts of appeals, and the decisions below are correct, the petition for a writ of certiorari should be denied.

I. INADVERTENCE CLAUSES ARE NOT *PER SE* UNLAWFUL

A motor common carrier may limit its liability for loss or injury to a shipper's property to a value established by "written declaration of the shipper" *or* by "written agreement between the carrier * * * and shipper." 49 U.S.C. § 10730(b)(1). This case involves a facial challenge to the inclusion of inadvertence clauses in carriers' tariffs; the issue before the ICC therefore was whether a bill of lading that incorporates a tariff containing an inadvertence clause may *ever* constitute a "written agreement between the carrier * * * and shipper" establishing a released value for the goods. The Commission correctly concluded that such a bill of lading could serve as the requisite written agreement, reserving the question whether enforcement of an inadvertence clause could

be unreasonable under the facts of a particular case. See Pet. App. B8.

The bill of lading indisputably is a written agreement between the carrier and shipper. That agreement incorporates the terms of the tariff—as to which the shipper is charged with knowledge [2]—and therefore includes the inadvertence clause, which by its terms establishes a released value for the goods. All of the elements of Section 10730(b)(1) are thus satisfied, and, if the released value "would be reasonable under the circumstances," the statute would allow enforcement of the liability limitation. Pet. App. A8; accord, *Mechanical Technology Inc.* v. *Ryder Truck Lines, Inc.*, *supra*.[3]

The alternative interpretation of Section 10730(b) espoused by petitioners would allow a shipper to gain the benefit of the lower released rate for undamaged shipments and at the same time ensure the availability of the carrier's unlimited liability in the event the goods are lost or injured. As the ICC observed, "[t]he intent of released rates (*i.e.*, a lower rate in return for assumption of some liability) would be defeated if the shipper, simply by failing to state a value, obtained both a lower rate and full carrier liability." Pet. App. B7 n.3. Enforcement of the inadvertence clause in appropriate circumstances serves to prevent this unfair result.[4]

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[2] See, *e.g.*, *Louisville & Nashville Railroad Co.* v. *Maxwell*, 237 U.S. 94, 97-98 (1915). Indeed, federal law requires carriers to make their tariffs available to shippers. 49 U.S.C. § 10762; 49 C.F.R. §§ 1312.5-1312.6.

[3] Contrary to petitioners' assertion (Pet. 12), nothing in Section 10730(b)(1) requires the written agreement to be separate from the bill of lading.

[4] Petitioners' construction of the statute not only would be unfair, it would render the second clause of the statute mean-

Petitioners erroneously (Pet. 4, 10-11) equate the inadvertence clause with an automatic release of liability. The clause is not automatic. It is effective only because it is incorporated into the bill of lading—the contract between the shipper and the carrier—and because the shipper fails to declare a higher value on the bill of lading. *The shipper can avoid any limitation on the carrier's liability simply by declaring the full value of the goods.* And, of course, the shipper may challenge the reasonableness of the inadvertence clause under Section 10730(b)(1)'s "appropriate under the circumstances" standard or challenge the application of the clause under 49 U.S.C. §§ 10701 and 10708.

Finally, as the agency charged with enforcing the Interstate Commerce Act, the ICC is entitled to deference in its construction of the statute. The Commission's determination accords with the language of the statute and furthers Congress's goal of increasing the availability of released rates (see H.R. Rep. No. 1069, 96th Cong., 2d Sess. 25-26 (1980)), because carriers are more likely to offer such rates when they have greater certainty concerning their potential liability for loss or injury to goods. The administrative determination was properly upheld by the court of appeals. See *Drug & Toilet Preparation Traffic Conf.* v. *United States*, 797 F.2d 1054, 1058 (D.C. Cir.

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ingless, because petitioners would always require a separate written declaration of the value of the goods in order to find a released value; a written agreement between shipper and carrier could never suffice. That approach is inconsistent with the settled principle that a provision should be interpreted so as to give effect to all of its provisions. See *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 833 (1983).

1986) (discussing Commission's broad authority to authorize released value rates).[5]

II. THE DECISION BELOW ACCORDS WITH DECISIONS OF THE OTHER COURTS OF APPEALS ADDRESSING THE LAWFULNESS OF INADVERTENCE CLAUSES

Petitioners argue (Pet. 13-19) that the courts of appeals disagree with respect to the lawfulness of inadvertence clauses. But the cases cited by petitioners do not address the general lawfulness of inadvertence clauses. They concern the question not addressed by the Commission here—the reasonableness of enforcing an inadvertence clause in the circumstances of a particular case.

In *Anton* v. *Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978), for example, the court did not even discuss the facial validity of inadvertence clauses. It held that there was no agreement between the shipper and the carrier, noting that the shipper did not sign the bill of lading. 591 F.2d at 108. Indeed, because the bill of lading was not issued by the

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[5] Petitioners argue (Pet. 13-15) that the Commission's decision represents a change in position. But the Commission has approved tariffs containing inadvertence clauses (Pet. App. A10-A11, B6) and petitioners have not pointed to a single prior decision in which the Commission held that inadvertence clauses were *per se* invalid. All of the decisions that petitioners cite address the question whether holding the shipper to the released value specified in the inadvertence clause would be consistent with the "reasonable under the circumstances" standard set forth in Section 10730(b)(1). Finally, as the Commission observed (Pet. App. B7 n.3), to the extent some of the language in a 1979 opinion might be read to indicate blanket disapproval of inadvertence clauses, that language is inconsistent with the congressional policy favoring released rates embodied in the 1980 revision of the Interstate Commerce Act.

carrier, the court concluded that the requirements of the predecessor to Section 10730(b) could not be satisfied in that case. 591 F.2d at 108.

Similarly, in *Gordon H. Mooney, Ltd.* v. *Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir.), cert. denied, 449 U.S. 875 (1980), the court declined to enforce the inadvertence clause because "*neither the freight rate* nor the valuation itself was written on the bill of lading." 616 F.2d at 626 (emphasis added). The court thus concluded there was insufficient evidence that the shipper had agreed to the rate containing the inadvertence clause. Accord, *Mass* v. *Braswell Motor Freight Lines, Inc.*, 577 F.2d 665, 667 (9th Cir. 1978); *Caten* v. *Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945) (shipper never received bill of lading and therefore could not be bound by terms of tariff). The Second Circuit made clear in its decisions in *Ruston Gas Turbines, Inc.* v. *Pan American World Airways*, 757 F.2d 29 (2d Cir. 1985), and *Mechanical Technology* that inadvertence clauses may be enforced in some situations—the precise conclusion reached by the Commission and the court below.

Finally, the court in *Chandler* v. *Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967), did not find that inadvertence clauses were illegal *per se*. To the contrary, the court, in remanding the matter for trial, noted that "[i]t is still possible that the jury might determine that there was an agreement in writing as to released value—without regard to the invalidity of the shipper's signature." 374 F.2d at 137; see also *id.* at 137 n.17, *citing Cray* v. *Pennsylvania Greyhound Lines, Inc.*, 110 A.2d 892, 896 (Pa. Super. Ct. 1955) (upholding an inadvertence clause).

In sum, none of the cases cited by petitioners support their contention that inadvertence clauses are *per se* unlawful.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Counsel for Respondent National Freight Claim & Security Council

* *Counsel of Record*

APRIL 1990

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[6] Petitioners also cite (Pet. 18) two district court cases. The court of appeals' decision in this case obviously deprives the decision in *Thomas Electronics, Inc.* v. *H.W. Taynton Co.*, 277 F. Supp. 639 (M.D. Pa. 1967), of any precedential effect. *Fine Foliage, Inc.* v. *Bowman Transportation, Inc.*, 698 F. Supp. 1566 (M.D. Fla. 1988), did not even concern an inadvertence clause. The court declined to give effect to a tariff provision denying all liability with respect to cargo requiring certain special handling, stating that such a provision did not satisfy the requirements of Section 10730(b)(1) because it did not constitute a declaration or agreement with respect to a released value. 698 F. Supp. at 1575.

No. 89-1255

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 6, 1990

STATEMENT OF QUESTIONS PRESENTED

Whether the Interstate Commerce Commission properly decided that tariffs containing inadvertence clauses are not per se illegal.

Whether the Interstate Commerce Commission has authority to permit interstate motor carriers of property to maintain within their tariffs, provisions which specify a limitation of their liability where the shipper has inadvertently failed to select from among the liability limitations offered by the involved tariff provisions.

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below:

National Small Shipments Traffic Conference, Inc.
The Health and Personal Care Distribution Conference, Inc. (formerly named Drug and Toilet Preparation Traffic Conference, Inc.)
Interstate Commerce Commission
United States of America
National Freight Claims and Security Council of American Trucking Associations
National Motor Freight Traffic Association, Inc.
Roadway Express, Inc.

Petitioners, as named on the cover hereof, have no parent companies, subsidiaries or affiliates.

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October Term, 1989

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NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION AND DECISION BELOW

The opinions and decisions delivered in the courts below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

Interstate Commerce Act:

49 U.S.C. §10701 **Standards for rates, classifications, through routes, rules and practices**

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier) must be reasonable. Divisions of joint rates by those carriers (including rail carriers) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

49 U.S.C. §10730. Rates and liability based on value

(b)(1) Subject to the provision of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a freight forwarder may, subject to the provisions of this chapter (including, with respect to a motor carrier, the general tariff requirements of section 10762 of this title), establish rates for the transportation of property (other than household goods) under which the liability of the carrier or freight forwarder for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier or freight forwarder and shipper if that value would be reasonable under the circumstances surrounding the transportation.

49 U.S.C. §10762. General Tariff Requirements

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

49 U.S.C. §11707 Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II and IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property...

(c)(1) A common carrier and freight forwarder may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(c)(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

STATEMENT OF THE CASE

The petitioners are challenging the affirmance by the United States Court of Appeals for the Third Circuit of the Interstate Commerce Commission's denial of their request that any provisions known as "inadvertence clauses" be ordered expunged from tariffs of certain motor common carriers subject to its jurisdiction. The "inadvertence clauses" or so-called "automatic releases" specify a means of rating shipments under provisions which limit the carrier's liability, even though the shipments have been mistakenly tendered by the shipper and accepted by the motor carrier without the shipper's specific declaration of value on the bill of lading.

The Court, in upholding the I.C.C.'s determination, found that it was based on a permissible construction of involved sections of the Interstate Commerce Act (49 U.S.C. §§11707 and 10730). Moreover, it found that the "Commission's decision on inadvertence clauses was within its discretion to address as a function of filling the gaps of Congressional authorization [over released rates]." (See the decision as reproduced in Petitioner's Appendix A p. A-12).

The petitioners contend that the inadvertence clause is per se unlawful because in countermands alleged statutory requirements of 49 U.S.C. §§11707

and 10730(b) i.e., that any limitation of the carrier's liability must be predicated upon a separate written declaration of value by the shipper.

The Third Circuit rejected this argument explaining (at p. A-8) that:

> The I.C.C. determined, and we agree, that a bill of lading taken together with a filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper.

As will be demonstrated herein, the court's determination reflects the clear weight of judicial precedent.

Where an inadvertence clause is applicable, a separate shipper declaration of value on the bill of lading, although helpful and, in fact, required by the terms of the bill, is not a condition precedent to the carrier's liability limitation. To appreciate this, it is important to recognize first of all that the bill of lading constitutes the contract of carriage between the shipper and carrier. Prominently placed on the Uniform Bill of Lading/Contract 1/ is the statement:

> RECEIVED subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

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1 The Uniform Bill of Lading is published in a motor carrier tariff known as the National Motor Freight Classification and is applicable for all of the carrier participants in this tariff - including the 10 motor carriers specifically named in the petitioners' complaint to the I.C.C.

The Classification and tariffs of which the Bill of Lading speaks comprise the carrier's notice to the world as to its price and service offerings. The I.C.C. and the courts have frequently recognized that:

> A shipper is charged with notice of the terms and conditions - including those affecting liability - contained in a tariff filed with the Commission. Drug & Toilet Preparation Traffic Conf. v. U.S. 797 F. 2d 1054, 1061 (D.C. Cir, 1986)

The tariff provisions at issue in this proceeding are known in the industry as "released rates" provisions inasmuch as they serve to limit the carriers' liability for loss or damage to the goods they transport. If no such limited liability or released rates provision is applicable, the carrier would be statutorily liable for the full amount of any loss or damage to the property.2/

Under principles long established by the Interstate Commerce Commission, the release of a carrier's statutory liability must be predicated upon a quid pro quo, namely the shipper's obtaining a reduction in the rates which would otherwise apply if the carrier incurred full liability. Normally, released rates provisions allow the shipper to select from among

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2 Under 49 U.S.C. §11707(a)(1) full liability is imposed on: (1) the receiving carrier; (2) the delivering carrier; or (3) another carrier over whose line or route the property is transported...

several valuations or liability limitations on the property tendered for transportation.3/

The Uniform Bill of Lading includes a Note, prominently displayed, which serves as a reminder that where the rate is dependent on value, (for example, where a released rates provision is applicable) the shipper is required to state specifically in writing the agreed or declared value of the property4/ in the blanks provided for this purpose on the form.

The inadvertence clause is a part of some, but not all, released rates provisions. Where a shipper has failed to make the required selection from among several available liability limitations, this clause operates to mandate the application of one of these options.5/

Inadvertence clauses are often used to protect the carrier where it has concluded that the commodity is of such high value that full liability would pose an

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3 (the liability limitations are usually stated in dollars or fractional dollars per pound). The valuations which provide the lowest carrier liability also are associated with the lowest rates and ratings. Thus, the shipper is offered less protection for loss or damage to its products, but the applicable rate is lower.

4 This in sharp contrast to the petitioners' erroneous contention (Pet. For Cert. at p. 7) that under the bill of lading the shipper is invited to insert a value if he wants to declare or release the value of a shipment.

5 Petitioners (Pet. For Cert. at p. 8) erroneously contend that the inadvertence clause always applies to the lowest valuation. In fact the highest valuation is usually applied. Item 116032 was developed to apply to the lowest valuation as an accommodation to the shippers.

unacceptable risk of loss.6/

Contrary to Petitioners' allegations (Pet. For Cert. p. 14), inadvertence clauses do not represent a new phenomenon. The Interstate Commerce Commission as well as the courts, has recognized the utility, legality and enforceability of these provisions for over 30 years. (See Appendix A.)

SUMMARY OF ARGUMENT

Petitioners advance two reasons for granting the writ i.e., (I) that the Third Circuit decision has raised an important legal question and (II) that there is disagreement among the circuits as to the issue decided. Neither of these will withstand scrutiny. In fact, the challenged decisions of the Interstate Commerce Commission and the Third Circuit are well founded and are in accord with the clear weight of applicable precedent.

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6 Stated differently, these clauses are used as part of the tariff provisions applicable on a particular commodity where the carrier has determined that it can afford to provide service on the commodity only if its liability is limited. Additionally, the inadvertence clause solves a difficult problem which arises where, due to human error, a shipment moving on a released rates item is inadvertently picked up by the carrier without the specified written release by the shipper. If the released rates provision does not apply, and the carrier's tariff does not include an alternative full value provision, there may be difficulty in rating the shipment. Finally, the inadvertence clause allows both parties to contract on a reasonable limit for the carrier's liability. [Shippers National Freight Claim Council v. I.C.C., 712 F.2d 740, 749 (1983)]

In contrast, the arguments of the petitioners are based on a misconception of the purpose and function of the inadvertence clause and the governing legal precedent. Petitioners begin with the erroneous premise that, until this decision, a "shipper of freight had been secure in the knowledge that under 49 U.S.C. §11707 and §10730, unless it made a written declaration of value on the bill of lading, it would be recompensed for the full value of any freight lost and damaged in transit." This allegation fails to recognize that for over 30 years, inadvertence clauses have been accepted and approved by the I.C.C. as a way in which carriers can insure that their liability will be limited, even if the shipper fails to provide the requisite declaration of value. Contrary to petitioners, where an inadvertence clause is applicable, the shipper has never had the option of electing whether or not to limit the carrier's liability, nor has a shipper's affirmative declaration of value been a prerequisite to the limitation of the carrier's liability.

The bill of lading, as the applicable contract of carriage, provides clear notice to the shipper that the tendered shipment will be subject to all of the carrier's tariff provisions - including any pertinent inadvertence clauses.

Further, it is well settled that shippers are charged with knowledge of the provisions under which they ship [Drug & Toilet Preparation Traffic Conf., Inc. v. United States 797 F.2d 1054, 1058 (D.C. Cir. 1986)]. Consequently, the shipper's signature or other assent to the terms and conditions of the bill of lading constitute its agreement to the liability

lading constitute its agreement to the liability limitation imposed by the pertinent tariff provisions - including the inadvertence clauses.

Petitioners also fail to recognize that in the Second Cummins Amendment, (Act of August 9, 1916, Ch. 301, 31 Stat. 441) enacted at the urging of the I.C.C., as part of the Interstate Commerce Act, Congress gave the Commission very broad discretion over released rate matters. And it exempted from normal "Carmack" liability, commodities which are encompassed by released rate tariff provisions filed subject to the I.C.C.'s supervision and in accord with its requirements. The I.C.C.'s "untrammeled" authority over released rates has been clearly recognized in judicial decisions spanning the last 75 years.

Finally, with one exception, the cases relied on by petitioners are not relevant in that they merely cite the general principle that a carrier is liable, absent the shipper's affirmative release; but they do not include consideration of the inadvertence clause which, as indicated, provides a recognized exception to the general principle. The decisions which do consider the effect of inadvertence clauses strongly favor the enforceability of these provisions and are in accord with the Third Circuit's decision herein being challenged.

REASONS FOR DENYING THE WRIT

I. THE I.C.C. ACTED WELL WITHIN ITS STATUTORY AUTHORITY

The petitioners' argument, that this proceeding raises an important legal question, is grounded upon a basic misconception as to the purpose and function of released rates provisions in general and the inadvertence clause in particular, as well as a misreading of the governing precedent in this area. For example, petitioners erroneously contend that "under 49 U.S.C. §10730, the shipper of freight had been secure in the knowledge that, unless it made a written declaration of the value on the bill of lading, it would be fully recompensed for loss and damage in transit" (Pet. For Cert. p. 6). This allegation fails to recognize that for over 30 years, inadvertence clauses have been accepted and approved by the I.C.C. as part of the motor carriers' released rates tariffs. The I.C.C.'s denial of petitioners' complaint was therefore clearly in keeping with its long standing precedent.

Petitioners cite the decision in Released Rates Order MC-1 (RRO MC-1), where the Commission required a specific shipper declaration of value. They argue that this requirement exemplifies the I.C.C.'s correct reading of the statute. This argument misses the mark. Contrary to petitioners, the I.C.C.'s requirement in Released Rates Order MC-1 doesn't provide a clue as to its conclusions regarding the legality of inadvertence clauses. The lack of authority for an inadvertence clause in RRO MC-1 merely

illustrates that when applying for released rates authority, the carriers didn't request such an inadvertence clause as a part of their application. There are other instances where the I.C.C. refused to permit an inadvertence clause if it concluded that the clause would not be appropriate for the particular commodities named.

In fact, the released rates orders which do include authorization for inadvertence clauses also typically include the very same language quoted by petitioners from RRO MC-1 (see Pet. For Cert. pp. 14, 15), i.e. which require the shipper to provide a release in a specified form (See Appendix A). The inadvertence clause applies where the shipper fails to make the required certification.

Petitioners (Pet. For Cert. at p. 14) cite several cases which, they contend, demonstrate that, prior to this case, the Commission has uniformly required a liability limitation to be predicated on an affirmative specification by the shipper of a released valuation on the shipping order or the bill of lading. The decisions cited by the petitioners are as follows: Released Rates Rules -- National Motor Freight Classification, 316 ICC 499, 512-13 (1962); Released Rates -- Small Shipments Tariff, 361 ICC 405, 413 (1979); and Transconex Inc. -- General Commodities, unpublished decision served November 15, 1982, affirmed without opinion, Drug and Toilet Preparation Traffic Conference v. I.C.C., No. 83-1587 (D.C. Cir. 1984).

Far from demonstrating a uniformity in the I.C.C.'s prior decisions, these cases merely reveal that the Commission has reviewed released rates applications

on a case-by-case basis and in some instances it has exercised its discretion to deny applications which include an inadvertence clause - i.e. under certain circumstances and with respect to certain commodities. Moreover, it should be noted that in all three of the cases referenced by petitioners, the applicant is seeking a blanket liability limitation applicable on general commodities rather than a narrowly drawn liability limitation on a specific commodity. In fact, with respect to Released Rates Rules -- National Motor Freight Classification, Supra, the Commission's denial of the initial applications, on the basis that it didn't have authority to grant the requested liability limitation, was overruled by the United States District Court for the Eastern District of Virginia in Southern Railway v. United States, 194 F. Supp. 633, 636 (1961). The court held that, in view of the I.C.C.'s untrammeled authority over released rates, the Commission could permit virtually whatever liability limitation provision it deemed appropriate. On reconsideration, the I.C.C. determined that the applicants had not made a strong enough showing to justify the sought blanket released rates authority, and denied the application on that basis.

Contrary to petitioners' argument, the fact that the I.C.C. has chosen to approve some inadvertence clauses while rejecting others merely confirms the wisdom of the Congress in passing the Second Cummins Amendment. This amendment gave the Commission broad discretion over released rates provisions in recognition that such authority could not be properly legislated by a statutory rule. Rather,

released rates applications need to be considered and granted on a case-by-case basis in view of the circumstances of the transportation involved -- an appropriate task for the I.C.C. as the expert administrative agency with jurisdiction over such matters.

Petitioners are also clearly mistaken in arguing that even where inadvertence clauses are applicable, shippers still have the option of defeating the specified liability limiting provisions by simply electing not to select from among the several valuations provided by the applicable released rates item (Pet. For Cert. pp. 8, 12). This would defeat the purpose of the inadvertence clause.

While Petitioners contend that carriers are forbidden to limit their liability through tariff provisions (Pet. For Cert. p. 9), the released rates tariff provision is, in fact, the only way in which the statute permits the motor common carriers to limit their liability. The petitioners' logic is based upon the erroneous presumption that the inadvertence clause would allow the carrier to unilaterally limit its liability, leaving the shipper at the carrier's mercy (Pet. For Cert. p. 7). This argument ignores the Commission's role of protecting the public interest by reviewing released rates provisions in the tariffs of motor common carriers. Under 49 U.S.C. §10730(b), released rates publications are subject to all of the requirements of subchapter II of Chapter 105 of the Interstate Commerce Act, including the requirement spelled out in §10701, that all aspects of the tariff

provision - including the liability limitation - be reasonable under the circumstances surrounding the transportation. Further, §10730(b) provides that the Commission may require the carrier to also publish a full value rate for such service. Consequently, rather than having the shipper at their mercy by being at liberty to publish any liability limitation they choose, the carriers' released rates publications - including the inadvertence clauses - are subject to the scrutiny of the I.C.C.

II. THE THIRD CIRCUIT'S DECISION RECOGNIZES THE ICC'S BROAD DISCRETION OVER RELEASED RATES

Petitioners are equally misguided in arguing that the language of §§ 11707 and 10730 clearly forbids inadvertence clauses and that these provisions serve to defeat the Congressional intent. Contrary to this argument, the Third Circuit (Pet. App. p. 6) found that:

> "neither the plain language, and its legislative history, nor the case law interpreting these sections is clear. Accordingly, we are required to determine whether the agency's answer is based on a 'permissible interpretation' of the statute." Chevron USA, Inc. v. NRDC Inc., 467 at 843 (1984)

The legislative history of §§11707 and 10730 clearly demonstrates that when it enacted the Second Cummins Amendment at the urging of the Interstate

Commerce Commission, Congress entrusted the Commission with very broad discretion over the matter of released rates. For example, the Senate Report which accompanied this legislation clarified that the Amendment was intended to exempt the carriers from full "Carmack" liability for loss and damage on:

> "property ... with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively at a rate dependent upon value, either an agreed or released value" (Senate Rep. No. 394, 64th Cong., 1st Sess., p. 2).

In regard to released rates and inadvertence clauses, it is therefore incorrect to state, as Petitioners do, that the Interstate Commerce Act codifies the law as set forth in Hart v. Pennsylvania R.R., 112 U.S. 331 (1884), (Pet. For Cert. p. 4). Clearly Hart was superceded by the subsequent legislation i.e., the Carmack Amendment (Act of June 29, 1906, Ch. 3591, §7, 34 STAT. 595), the First Cummins Amendment (Act of March 4, 1915, 38 STAT. 1196) and the Second Cummins Amendment supra.

Decisions spanning almost three-quarters of a century since the enactment of the Second Cummins Amendment, recognize the I.C.C.'s broad discretion in this area. In Southern Railway Co. v. United States, 194 F. Supp. 633, 638 (1961), the United States District Court for the Eastern District of Virginia summarized the pertinent legislation explaining:

> Epitomized, the legislative history of the released rates is this: in 1906 the Congress barred the total exemption of a carrier from liability; in 1915 Congress tolerated released rates conditionally; in 1916 Congress approved all released rates which had theretofore been allowed by the Commission and left the whole problem thereafter to the discretion of the Commission. (emphasis added) (194 F. Supp. at p. 638)

See also American Ry. Express Co. v. Lindenberg, 260 U.S. 584 (1923), National Motor Freight Traffic Association v. I.C.C., 590 F. 2d 1180, 1185 (1978); Shippers National Freight Claim Council v. I.C.C., 712 F. 2d 740, 749 (1983).

In its decision, the Third Circuit cited Drug & Toilet Preparation Traffic Conf., Inc. v. United States, 797 F. 2d 1054, 1058 (D.C. Cir. 1986) as authority for its conclusion that in denying the petitioner's complaint, the Commission had acted in accord with its delegated "function of filling in the gaps of Congressional authorization:" (Citing, Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984) (Pet. App. pp. 9, 12)

Finally, in its decision under review, the Third Circuit, citing 49 U.S.C. §10762, points out that Congress has delegated to the I.C.C. very broad discretion in regard to tariffs. Indeed, §10762(d)(1) gives the Commission virtually carte blanche to change its requirements regarding released rates inadvertence clauses or virtually any other tariff provisions, "if cause exists in particular instances or as they apply in special circumstances."

Contrary to Petitioners (see Pet. For Cert. pp. 11, 12), the application of the inadvertence clause is not based upon the theory of a "constructive agreement" between the shipper and carrier. Rather, as previously indicated, the Commission and the Courts have found that, when taken together, the carrier's tariff and bill of lading constitute an actual agreement. As indicated, the contract of carriage (the bill of lading) makes clear reference to the carrier's tariffs which contain the applicable inadvertence clauses and shippers are charged with notice of the tariff terms and conditions -- including those affecting liability. (See Drug & Toilet Preparation Traffic Conf. v. U.S., Supra, at 1061). Therefore, the shipper who signs the bill of lading has agreed to the carrier's applicable tariff provisions -- including the inadvertence clause.

In view of the foregoing, it is clear that the Interstate Commerce Commission has well established authority to permit inadvertence clauses to be included within the tariffs of carriers subject to its jurisdiction.

III. RECENT CASES HAVE UPHELD THE INADVERTENCE CLAUSE

In recent years, there have been a number of cases in which the application of inadvertence clauses has been challenged. The clear weight of precedent is represented by cases such as W.C. Smith, Inc. v. Yellow Freight System, Inc., 596 F Supp. 515 (U.S.D.C. E.D. Pa. 1983). and Mechanical Technology

v. Ryder Truck Lines, Inc., 776 F. 2d 1085 (2d Cir. 1985), in which the inadvertence clause was held enforceable based upon the written agreement requirement being satisfied by the bill of lading together with the carrier's tariffs.

In Mechanical Technology, supra, the inadvertence clause of item 116032 of the National Motor Freight Classification (NMFC) (applicable on computers and computer components) was upheld in the absence of a specific release signed by the shipper. The Court found that the shipper was sophisticated in transportation matters and that knowledge of the tariff must be imputed to it. Consequently, when the shipper left blank the space on the bill of lading which was provided for declaring the released value of the goods, it did so with full knowledge of the consequences under the applicable tariff.

Mechanical Technology, supra has been cited as authority for a number of other decisions enforcing the inadvertence clause. These include: Digital Equipment Corporation v. Salvage Discount, Inc., No. 87-442-G (M.D. NC. 1988) (Attached to NMFTA's Brief to the Third Circuit as Appendix E) and Great American Insurance Co. v. ANR Freight System, Inc., No. 88-0466 MHP (N.D. CA. 1989).

IV. THE COURTS HAVE UPHELD INADVERTENCE CLAUSES EVEN WITHOUT RECOGNIZING THAT THESE CLAUSES WERE AUTHORIZED BY THE I.C.C.

From a review of the relevant precedent set forth in the previous section, it is apparent that the cited cases focus largely on the enforceability of the involved inadvertence clauses -- particularly item 116032 of the National Motor Freight Classification, which is applicable to shipments of computers and computer components.7/ NMFC items 116030 and 116032 are perhaps the most litigated of all motor carrier released rates/inadvertence clause provisions and, indeed, they were prominently mentioned and

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7 Prior to the Motor Carrier Act of 1980 [49 U.S.C. 10706(b)], in order for a carrier to obtain authority to limit its liability, it was necessary to file an application with the I.C.C.'s Released Rates Board. A notice of the released rate application was then published in the Federal Register so that all interested parties could appear and make known their views regarding the pertinent issues.

This usual procedure was followed by the NMFTA in applying for released rates authority for many commodities on behalf of its member carriers - including Released Rates Order No. 894, which authorized the provisions of National Motor Freight Classification items 116030 and 116032 embracing computer or data processing equipment. (See NMFTA's Appendix A hereto for reproduction of items 116030, 116032 and an identification of various released rates items containing inadvertence clauses which are presently included in the motor carrier tariff published by the NMFTA i.e., the National Motor Freight Classification.

interpreted in the decisions of both the I.C.C. and the Third Circuit which are at issue herein.8/ Further, items 116030 and 116032 became the model for many

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7 The decisions of the Commission and the Third Circuit specifically recognize that in Machines, Data Processing, Classification Ratings, 353 I.C.C. 661 (1977), the proceeding before the ICC's Released Rates Board concerning the NMFTA's application on computer products, there were a number of shipper parties, including the petitioners herein, who wholeheartedly supported the proposed provisions and raised no objection to the included inadvertence clause.

Now the petitioners have taken a position which is diametrically opposed to the position they took with respect to the Machines, supra proceeding which resulted in Released Rates Order No. 894. They now seek to have stricken certain portions of the very provision which was established, in part, on the basis of their support.

Petitioners argue (Pet. For Cert. at pp. 14-15) that the inadvertence clause was not at issue in Machines supra. Petitioners' allegation is completely false. The released rates application filed by the National Motor Freight Traffic Association specifically included the inadvertence clause In fact, as an accommodation to the supporting shippers, the clause is somewhat unusual in that it makes the lowest rather than the highest valuation applicable. The reason it was not prominently mentioned in the discussion portion of the decision is that the shippers -- including petitioners herein -- raised no objection to it.

8 While the complaint was directed to certain tariff provisions of 10 named carriers, it also included all similar or comparable inadvertence clauses maintained on their behalf, such as those maintained in the National Motor Freight Classification.

other released rates provisions -- including item 3010-C of Roadway Express Tariff 301-C, "Used Machinery and Agricultural Implements," which appeared in petitioner's original complaint as well as in the decisions of the I.C.C. and the Third Circuit. (See Pet. App. pp. A-3, B-3)

Unfortunately, the course of litigation in many cases involving released rates has been altered as a result of an unfortunate accident. The specific authorization for the inadvertence clause in NMFC item 116032 (computers and computer components) was mistakenly omitted from the original decision which was printed in the I.C.C. Reporter, 353 I.C.C. 661 (1977) because of its importance to the transportation industry.9/ The part of the decision specifically authorizing the inadvertence clause was published 10 days later in a separate decision which was never printed in the I.C.C. Reporter.

Inasmuch as NMFC item 116032 was the inadvertence clause at issue in Mechanical Technology, supra, Digital Equipment Corporation, supra and Great American Insurance Co., supra, the courts, not knowing that the inadvertence clause had been specifically authorized by decision of the I.C.C., were obliged to decide the case solely on the basis of the "sophisticated" shipper being "charge with notice of the terms, conditions, and regulations contained in the tariff schedule."

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9 Few released rates decisions are printed in the I.C.C. Reporter.

The recent line of decisions is, however, important to the instant proceeding inasmuch as it manifests recognition, by a number of courts, of the principle that the shipper can be properly charged with knowledge of the provisions under which it ships -- including the inadvertence clause.

Petitioners place great reliance in the holding of General Electric Co. v. McLean Trucking Co., Civil No. 85-417-A (E.C. Va 1985) (GE), that "under §11707(C)(1) & (4) 'the carrier's attempt to get a liability limit by tariff was void unless there was compliance with §10730'". A review of GE will reveal that it was wrongly decided. Although the principal issue in GE was the enforceability of the involved inadvertence clause (item 160080 of Eastern Central Motor Carrier's Association Tariff, 534 ICC ECA 534), the Court was not advised of a single case such as W.C. Smith, Inc. v. Yellow Freight System,Inc. supra) in which an inadvertence clause was upheld. Instead, citing Gordon H. Mooney Ltd. v. Farrell Lines, Inc., 616 F. 2d 619, 626 (2d Cir. 1980); Mass v. Broswell Motor Freight Lines, Inc., 577 F. 2d 665 (9th Cir. 1978); Anton v. Greyhound Van Lines, Inc., 591 F. 2d 103 (1st Cir. 1978); and Catin v. Salt City Movers & Storage Co., 149 F. 2d 428 (2d Cir. 1945), the Court stated as justification for its decision:

> "Every case brought to the court's attention has, under circumstances similar to those found here, declined to give the tariffs effect in the face of 49 U.S.C. §§10730, 11707." [See Slip opinion p. 8 Appendix G hereto]

Unfortunately not one of the cases cited by the Court focused on enforceability or the validity of an inadvertence clause. And yet, these cases were cited as the reason the involved inadvertence clause in item 160080 could not be upheld.

The Petitioners make precisely the same mistake in citing the very same cases which were referenced by the court in GE.

Contrary to the allegation of the Shipper Conferences, the Commission was clearly correct in stating that there was a "virtually unbroken string of decisions upholding the inadvertence clauses in tariffs." The cases cited by the Shipper Conferences do not concern inadvertence clauses and, are therefore, irrelevant to the issues of this proceeding.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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TRAFFIC ASSOCIATION, INC.

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April 6, 1990

APPENDIX A

A LISTING OF RELEASED RATES ITEMS CONTAINING INADVERTENCE CLAUSES WHICH APPEAR IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION - ALL OF THESE ITEMS WERE PUBLISHED PURSUANT TO A SPECIFIC RELEASED RATES ORDER OF THE I.C.C. - ITEMS CONTAINING INADVERTENCE CLAUSES INCLUDE THE RELEASED RATES ORDER NUMBER AND DATE OF THAT ORDER

ITEM	ARTICLES	RELEASED RATES ORDER
62820	Radio, Radio-telephone or Television Transmitting and Receiving Sets, or other Radio Impulse or Wireless Audio (Sound) Impulse Transmitting or Transmitting and Receiving sets	Order No. MC-597 Dec. 24, 1964
62822	Inadvertence clause	
63025	Semi-conductors	Order No. MC-529
63031	Inadvertence clause	March 21, 1963
70080	Flatware, Dresserware or Holloware	Order No. MC-525
70082	Inadvertence clause	Dec. 17, 1962
88140	Glassware	Order No. MC-607
88143	Inadvertence clause	April 15, 1965
99400	Hides, Pelts or Skins	Order No. MC-519
99402	Inadvertence clause	Oct. 12, 1962
107830	Jewelry	Order No. MC-455
107834	Inadvertence clause	Aug. 17, 1960
116030	Machines, Systems or Devices	Order No. MC-894
116032	Inadvertence clause	May 10, 1977
120800	Engines	Order No MC-296
120844	Inadvertence clause	Feb. 23, 1949
136500	Metal, NOI, or Metal Alloys, NOI	Order No. MC-439
136516	Inadvertence clause	April 7, 1959
164900	Radioactive Materials, Articles or Isotopes	Order No. MC-558
164906	Inadvertence clause	Jan. 27, 1964
196420	Watches or Watch Movements	Order No. MC-615
196420 sub 3	Inadvertence clause	June 7, 1965

ITEMS 116030 AND 116032 -
MACHINES, SYSTEMS OR DEVICES
(REPRODUCED IN FULL)

NATIONAL MOTOR FREIGHT CLASSIFICATION

ARTICLES		CLASSES		
Item		LTL	TL	MW
116030	Machines, systems or Devices, data processing, or units that form components of data processing machines, systems or devices, in boxes or Packages 2254 or 2373 or when weighing each not in excess of 1,600 pounds, in wireboard rates, or Parts thereof, NOI, in boxes or Packages 2253 or 2373; or Electronic Telephone Switching Systems or components for such systems, in boxes or crates, see Notes, items 61483 and 63242 or in Packages 1027, 2050, 2286 and 2291; see Note, item 116032:			
Sub 1	Released to a value not exceeding $5.00 per pound.....	92.5	55	24
Sub 2	Released to a value exceeding $5.00 per pound but not exceeding $10.00 per pound.....	150	92.5	20
Sub 3	Released to a value exceeding $10.00 per pound but not exceeding $25.00 per pound.....	250	125	20
116032	NOTE--The released or declared value of the property must be entered on the shipping order and bill of lading at time of shipment in the following form: 'The agreed or declared value of the property is hereby state by the shipper to be not exceeding $_____ per pound.' If the shipper fails or declines to execute the above statement or designates a value exceeding $25.00 per pound, shipment will not be accepted, but if shipment is inadvertently accepted, it will be considered as being released to a value of $5.00 per pound and the shipment will move subject to such limitation of liability. (The released values upon which the classes herein are dependent have been authorized by the Interstate Commerce Commission by Released Rate Order No. MC-894 of May 10, 1977, as amended August 10, 1979 and January 7, 1983, subject to complaint or suspension.)			

No. 89-1255

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission properly found that an "inadvertence clause" in a tariff, which provided that the lowest potential property valuation would apply to transported property unless the shipper declared a higher valuation on the bill of lading, was consistent with the requirements of 49 U.S.C. 11707 and 10730 (1982 & Supp. V 1987).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 887 F.2d 443. The opinion of the Interstate Commerce Commission (Pet. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered October 10, 1989. A petition for rehearing was denied on November 6, 1989. Pet. App. C1. The peti-

tion for a writ of certiorari was filed on February 5, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act (Act), a motor common carrier must file tariffs with the ICC containing the rates and other conditions for the transportation and service it offers. 49 U.S.C. 10761, 10762 (1982 & Supp. V 1987). After a carrier has received property for transportation under a tariff, it issues a bill of lading which, together with the tariff, constitutes the transportation contract. The bill of lading generally provides that the transportation is subject to the provisions of the governing tariffs. It also typically provides that when the tariff rate depends upon the value of the property shipped, the shipper must state specifically the declared or agreed-upon value. Pet. App. B2-B3.

This case involves the construction of two provisions of the Act, 49 U.S.C. 11707 and 10730 (1982 & Supp. V 1987). Section 11707 provides that, absent an agreement to the contrary, common carriers assume liability for the actual loss or injury to property they transport. Section 10730, however, provides that carriers may file tariffs containing "rates for the transportation of property under which the liability of the carrier * * * for such property is limited to a value established by a written declaration of the shipper or by written agreement between the carrier * * * and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. 10730 (1982 & Supp. V 1987).

2. Petitioners filed a complaint with the ICC seeking the cancellation, in particular tariffs, of tariff

items containing "inadvertence clauses." The tariffs set forth four "released-rate" options, under which the rates for transportation escalate with increases in the agreed-upon value of the property shipped.[1] The tariffs also include an inadvertence clause that provides: "If Consignor fails to declare a released value at time of shipment, shipment will be subject to the lowest released value herein." In effect, the inadvertence clause results in the application of the lowest released value (and, correspondingly, the lowest available rate) when the shipper fails to specify a higher value for its property. Pet. App. B2-B4.

Petitioners contended that inadvertence clauses are per se unlawful under 49 U.S.C. 10730 (1982 & Supp. V 1987). Pet. App. B4-B6. The ICC rejected that argument. The Commission noted that "inadvertence clauses are regularly included in released rate tariff[s] approved by the Commission" in order to permit carriers to classify property "when the shipper has failed to declare a value for its shipment." Since shippers may tender commodities of extremely high value, the absence of a default rate could be "extremely harmful" to large carriers and "catastrophic" to small carriers, because shippers could unilaterally impose full liability on a carrier by choosing not to declare the value of a shipment under a released-rate tariff. Pet. App. B6-B7.

Although in a prior decision the ICC had criticized inadvertence clauses, see *Released Rates on Small Shipments Tariff*, 361 I.C.C. 405, 413 (1979), the

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[1] In transportation parlance, the term "released value" refers to the agreed-upon level of liability that the carrier assumes in shipping property. The "released rate," in turn, is the rate obtained by the shipper in exchange for agreeing to limit the carrier's liability. Pet. App. B2-B3.

ICC declared that its former view did "not represent current Commission policy." Moreover, the ICC pointed to "[n]umerous cases" that have sustained the lawfulness of inadvertence clauses under 49 U.S.C. 11707, 10730 (1982 & Supp. V 1987). In particular, the ICC cited authority that "the written agreement requirements of section 10730 were satisfied where the tariff contained an inadvertence clause and th[e] shipper failed to declare a released value on the bill of lading." Pet. App. B7-B8.[2]

3. Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals denied petitioners' petition for review. The court first concluded that Congress had not directly addressed the validity of inadvertence clauses in the Interstate Commerce Act. Examining the statutory language and legislative history of the provisions governing carrier liability, the court stated: "We do not share petitioners' view that there is a pristine clarity to sections 10730 and 11707." Pet. App. A6.

Turning to the second step of analysis under *Chevron*, the court concluded that the ICC's interpretation of the pertinent provisions constituted a permissible construction of the statute. The court explained: "The I.C.C. determined, and we agree, that a bill of lading, taken together with the filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper"; therefore, the requirement of a written agreement, necessary to comply with the limitation-of-liability

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[2] In stressing that the present case involved only a facial challenge, the ICC distinguished cases "where a shipper claims that the [inadvertence] clause has been misused or its existence has been concealed." Pet. App. B8.

provisions of Section 10730, is satisfied under the tariffs challenged by petitioners. Pet. App. A8.

ARGUMENT

The court of appeals correctly upheld the ICC's narrow ruling in this case, namely, that inadvertence clauses in a tariff do not facially violate the Interstate Commerce Act. That decision correctly applied the principles of deference that regulate judicial review of an agency's construction of its governing statute. Because the court's decision does not conflict with any decision of this Court or with any decision of another court of appeals, this Court's review is not warranted.

1. Petitioners renew their contention that inadvertence clauses are per se invalid under the Interstate Commerce Act. Pet. 9. In petitioners' view, the only method a carrier may use to limit its liability is to rely on the shipper to "execut[e] the released value clause provided on the bill of lading for that purpose." *Ibid.*

As the court below held, petitioners' interpretation of the Interstate Commerce Act is not evident in the plain language of the statute or its general design; accordingly, deference to the ICC was required. Section 11707, which sets forth the presumption of full value recovery, states that "[a] common carrier may limit its liability for loss or injury of property transported under section 10730 of this title." 49 U.S.C. 11707(c)(4). Section 10730, in turn, provides that the carrier may establish rates that reflect limitations on its liability in accordance with a value set "by written declaration of the shipper or by written agreement between the carrier * * * and shipper[.]" 49 U.S.C. 10730 (1982 & Supp. V 1987). The statute does not define the meaning of the phrase

"written agreement between the carrier * * * and shipper"; in particular, it does not state that only an entry on the bill of lading may satisfy the requirements of the statute for this purpose. Petitioners are therefore mistaken in attributing a clear and precise interpretation to this inherently ambiguous language. Although petitioners' reading is certainly a possible construction of the language, it is far from the only reasonable one. In that context, a court "does not simply impose its own construction on the statute * * *. Rather, * * * the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *Sullivan* v. *Everhart*, 110 S. Ct. 960, 963-964 (1990).

In this case, contrary to petitioners' arguments, the ICC's construction was plainly reasonable. Petitioners assail (Pet. 10-11) the ICC's determination that inadvertence clauses, coupled with the bill of lading that incorporates them by reference, comply with the requirement under 49 U.S.C. 10730 (1982 & Supp. V 1987) that limitations on the value of transported property be established by "written agreement." The ICC's approach, however, comports with the long-standing recognition that the tariff ordinarily defines the terms of transportation, and is incorporated into each bill of lading reflecting the agreement between the parties with respect to the shipment of a particular item. Pet. App. B7-B8. Given that understanding, when the shipper pays a particular rate for transportation, it cannot later avoid the fact that its rate has implications for the valuation of its property. See *American Ry. Express Co.* v. *Daniel*, 269 U.S. 40, 42 (1925) ("The sender is bound to know the relation established by [the carrier's tariffs] between values and rates.").

The ICC also noted that its view was supported by a "virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs." Pet. App. B8. See, *e.g.*, *Mechanical Technology Inc.* v. *Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087 (2d Cir. 1985); *W.C. Smith, Inc.* v. *Yellow Freight Systems, Inc.*, 596 F. Supp. 515, 517 (E.D. Pa. 1983). See also *Co-Operative Shippers, Inc.* v. *Atchison, T.&S.F. Ry.*, 840 F.2d 447, 451-452 (7th Cir. 1988); *Norton* v. *Jim Phillips Horse Transportation, Inc.* No. 88-2630 (10th Cir. Mar. 29, 1990) (1990 U.S. App. LEXIS 4624). Against that background, petitioners advance no persuasive reason for rejecting the considered view, articulated by the agency charged with administering the Act, that inadvertence clauses are facially valid.[3]

Indeed, petitioners' arguments fall largely into the domain of policy—a realm that is left to the ICC, not to the courts. Petitioners protest that "the ICC [d]ecision approves a trap for all shippers," Pet. 8, and

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[3] Petitioners claim (Pet. 15) that the ICC's decision is not worthy of deference because the Commission simply adopted prior judicial constructions of the statute, without formulating its own interpretation. However, the ICC thoroughly explained the policy considerations that entered into its decision, Pet. App. B6-B7, as well as its reliance on prior ICC precedent, see *id.* at B6, citing *Machines, Data Processing, Classification Ratings*, 353 I.C.C. 661 (1977). Likewise, petitioners' assertion (Pet. 15) that only a "compelling" reason could justify the ICC's revision of policy is contrary to this Court's decisions. See *American Trucking Ass'ns, Inc.* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416 (1967) (regulatory agencies may adapt their rules to the country's needs "in a volatile, changing economy"). Provided the Commission adequately explains its rationale, as it did here, the ICC is free to make permissible changes in the construction of its governing statute. Cf. *Atchison, T.&S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 805-809 (1973) (plurality opinion).

that the decision "shift[s] most of the burden for loss or damage to a shipper's freight from the carrier * * * to the shipper," Pet. 7. The ICC, however, was persuaded by the consideration that inadvertence clauses are needed to permit carriers to quantify the risk they are assuming for shipping any particular item, and to assure that they are properly compensated for assuming that risk. The underlying premise of released rates is that shippers can calibrate the degree of protection they wish to purchase for a particular shipment. As the ICC explained, that premise "would be defeated if the shipper, simply by failing to state a value, obtained both a lower rate and full carrier liability." Pet. App. B7 n.3.

Nor does the ICC's decision purport to uphold inadvertence clauses in every case. Rather, the decision leaves open the opportunity for shippers to challenge the reasonableness of inadvertence clauses on a case-by-case basis, looking at all of the transportation circumstances. Cf. 49 U.S.C. 10730(b)(1) (the released value rate must be "reasonable under the circumstances surrounding the transportation"); 49 U.S.C. 11701(b) (shipper can file complaint with the ICC charging an unreasonable practice; 49 U.S.C. 10701(a), 10704(b)(1)); 49 U.S.C. 11707(d) (shipper can file civil action against carrier for damages). There is no reason to believe that the Commission's approach will fail to provide adequate protection when the application of an inadvertence clause would, in a particular case, produce unreasonable results.

2. Petitioners next contend (Pet. 13-19) that the decision below is in conflict with decisions from other courts of appeals considering inadvertence clauses. The cases cited by petitioners, however, either have been superseded by other developments in the law, or are distinguishable on their facts. Accordingly, they

do not present a conflict warranting this Court's review.

To begin with, petitioners rely on two older Second Circuit decisions that no longer reflect the current state of the law in that circuit. Whether or not petitioners can find support for their position in *Gordon H. Mooney, Ltd.* v. *Farrell Lines, Inc.*, 616 F.2d 619 (2d Cir.), cert. denied, 449 U.S. 875 (1980), and *Caten* v. *Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945), more recent cases make clear that the Second Circuit now adheres to the view that the bill of lading, read in conjunction with the tariff, *can* constitute a written agreement for purposes of Section 10730. *Mechanical Technology Inc.* v. *Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087 (2d Cir. 1985); *id.* at 1089-1090 (Winter, J., concurring) (noting court's implicit rejection of earlier decisions). The *Mechanical Technology* court explained: "When a sophisticated shipper, using his own bill of lading form, leaves blank the space provided for declaring the released value of the goods, we will presume that he did so deliberately with full knowledge of the consequences under the applicable tariff." *Id.* at 1089; cf. *Ruston Gas Turbines, Inc.* v. *Pan American World Airways*, 757 F.2d 29 (2d Cir. 1985) (upholding inadvertence clause on common law grounds).[4]

The decisions from the Fourth and Ninth Circuits cited by petitioners addressed different issues. For example, *Chandler* v. *Aero Mayflower Transit Co.*, 374 F.2d 129, 135 (4th Cir. 1967), did not pass judg-

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[4] Petitioners struggle to distinguish *Mechanical Technology* by noting (Pet. 17 n.12) that the court did not uphold every application of an inadvertence clause. By the same token, the ICC did not purport to uphold every application of such clauses in its decision in this case.

ment on an inadvertence clause at all. In reversing a directed verdict for the carrier, the court found that under principles governing the validity of adhesion contracts, the shipper might be able to establish that the bill of lading in that case did not validly limit the carrier's liability. *Id.* at 135-136. The court went on to state that the district court should consider whether the shipper should also be permitted to present a different theory of liability based on the carriers' failure to "give[] reasonable notice * * * that [the shipper] actually had a choice of 'higher or lower liability by paying a correspondingly greater or lesser charge.'" *Id.* at 137, quoting *New York, N.H.&H.R.R.* v. *Nothnagle*, 346 U.S. 128, 135 (1953). The court, however, expresed "no opinion" on the application of that theory to the particular facts. 374 F.2d at 137.

Nor did *Mass* v. *Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978) (per curiam), squarely consider inadvertence provisions like the ones involved here. In *Mass*, the court reversed a judgment in favor of a shipper and remanded for a new trial to allow the carrier to present the defense that the shipper had fraudulently misdescribed the shipped property. In passing, the court noted that there was no agreement to limit the value of the shipped property since "[t]he bill of lading did not contain a value or freight rate." *Id.* at 667. The court's brief and cryptic statement on that issue, however, did not analyze the argument that the bill of lading coupled with the tariff may constitute an agreement in particular circumstances; indeed, there is no indication that that argument was even advanced.

In *Anton* v. *Greyhound Van Lines, Inc.*, 591 F.2d 103, 108 (1st Cir. 1978), the court did espouse a theory that is in some tension with the reasoning of

the ICC, but did so only in an alternative holding, addresed to a particular set of facts. Relying principally on the Second Circuit's ruling in *Caten* v. *Salt City Movers & Storage Co., supra*—a case that no longer correctly states the law in its circuit of origin —the court stated that in order for a carrier to limit its liability by agreement, the shipper must have an "opportunity to choose" the rate level and the corresponding protection it wishes, and a carrier cannot rely simply on the fact that it maintained appropriate tariff schedules with the ICC. 591 F.2d at 108. But the judgment rested equally on the alternative rationale that the carrier had "failed even to *issue* * * * a receipt or bill of lading for plaintiff's goods," in violation of law. *Ibid.* Consequently, under the court's holding, the carrier had failed to satisfy the requirements for limiting its liability even apart from the application of the inadvertence clause.

Moreover, it is unclear whether the First Circuit would adhere to the views expresed in *Anton* in light of intervening developments in the law. Cf. *United Services Auto. Ass'n* v. *Paul Arpin Van Lines*, 652 F.2d 198, 201 (1st Cir. 1981) (reserving the question whether *Anton* should be reconsidered). The First Circuit relied on a rationale derived from a Second Circuit case that no longer sets forth the law of that circuit; moreover, the court did not have the benefit of the ICC's current views on the validity of inadvertence clauses.[5] We are unaware of any sub-

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[5] Even on its own terms, *Anton* does not condemn inadvertence clauses per se. See 501 F.2d at 108 n.9 (leaving open the issue whether a shipper's "opportunity to choose" might be satisfied in a given case by "an express or implied waiver of choice," without explaining further the scope or operation of such a rule).

sequent appellate cases applying *Anton* to inadvertence clauses, and, as indicated above, other recent decisions accord with the result reached by the ICC. In those circumstances, we do not believe that any tension between the alternative rationale of *Anton* and the decision below warrants review by this Court.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The remaining cases cited by petitioners are district court decisions; any variance in results in those cases does not warrant this Court's attention.

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v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ON REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

I. INTRODUCTION

One of the few things upon which the parties agree is that Congress codified a full value standard of liability for loss and damage in transit. (49 U.S.C. §11707). Where they sharply disagree is as to whether an automatic release in a carrier's tariff adequately complies with the terms of the limited statutory exception to the full value rule for a "written declaration of the shipper . . . or a written agreement between the carrier and shipper" releasing the freight to a limited value.

Thus, the government asserts that the term "released value" in transportation parlance refers to a value "the carrier assumes" for a shipment. (Govt. brf. at 3.) On the contrary, it is the shipper which releases the value of its freight through the affirmative act of making a written declaration or agreement as to the value of its freight. Obviously, if they could do so legally, carriers would like to "release" all shippers' freight to a nominal value for loss and damage recovery. The interpretation adopted in the Commission's decision means that the carrier itself can release the value of the shipper's freight on all traffic moving under a bill of lading (which is to say all traffic moving in common carriage), merely by stating in its tariff that if the shipper does not release the shipment, the carrier will deem it released to the value chosen by the carrier.

The implications of the statutory misinterpretation are enormous. Whereas the law has been that the carrier is held to full value, except in limited situations where the shipper releases the value, the Commission has now allowed carriers to reverse the operation of the statute, without actual shipper knowledge or agreement.

II. THE COMMISSION RELIED ON A MISREADING OF JUDICIAL STATUTORY INTERPRETATION AS SETTLED, INSTEAD OF MAKING ITS OWN INTERPRETATION.

The government's brief repeatedly mischaracterizes the carriers' tariff release as an "inadvertence clause" rather than as what it is, an automatic release.[1] The term "automatic release"

[1]Though not involved in this case, an inadvertence clause is a tariff note stating that, if the shipper does not enter a written release of value on the bill of lading, the shipment will be accepted at full value and initially be charged at the higher rate. Afterward, the tariff gives the right to the shipper who inadvertently failed to declare the actual value of the shipment to

(continued)

is an opprobrious one. It is understood to describe the instant situation, where the shipper does not declare a limited value on the bill of lading and the carrier purports to release the value for the shipper to less than the shipment's actual value by a notice in its tariffs. In effect, the carrier would hold the shipper to a release of the value of its freight below its actual value, even though the shipper made no writing or declaration other than the normal one of affixing its signature to a bill of lading which stated no released value. Shippers consider such automatic tarriff releases reprehensible as well as illegal, because they purport to affix limited liability by the shipper's mere signature to a bill of lading on which it has elected not to declare a released value.

The government's brief relies primarily upon the same argument it advanced to the court of appeals, *viz.*, that "petitioners' reading is certainly a possible construction of the [statutory] language"; but that the statute is framed in "inherently ambiguous language", so that the court was bound under these circumstances to "give deference to the ICC", citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (Govt. brf. at 4-6.)

This is not an appropriate case for deference. In the first place, it is hard to imagine how Congress could have addressed the matter more clearly. It is inconceivable that Congress, which so clearly sought to prohibit loopholes in the Carmack Amendment (49 U.S.C. §20(11): "no contract, receipt, rule, regulation, or other limitations of any character whatsoever shall exempt such common carrier . . . from the liability imposed . . . and any such limitation, without respect to the manner or

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submit proof of the lower value and be accorded the lower rate applicable at that value. Thus, an inadvertence clause is entirely legal because it contemplates that the shipment is handled at full value, as required by the statute.

form in which it is sought to be made is declared to be unlawful and void'') would, *sub silentio,* leave open the biggest loophole of all: that carriers may turn bills of lading into releases of liability simply by so providing in their tariffs.[2]

Not only does the statute clearly proscribe tariff releases, but the ICC did not undertake to make its own construction of the statute. There is absent from the ICC's decision the required analysis of the statutory purpose, of its history, of contrary precedent and of competing policy considerations prerequisite to making a reasoned interpretation of what is now argued to be an ''ambiguous'' statute.

In contrast to the government's brief, which argues that the statute is ambiguous and required construction by the ICC, the Commission's decision turned on the conclusion that agency construction was not necessary because the courts had already reached a settled construction:

> Their position has been examined on numerous occasions by the courts and found wanting. Stated simply, it is beyond question that inadvertence clauses are lawful under sections 11707 and 11730. (Pet. App. B-6).

After citing a selection of court cases which it read as supporting automatic releases, the Commission reached this dispositive conclusion:

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[2]Similarly, the contention that the ICC has left open the door to shippers to challenge the operation of automatic releases in particular cases must be rejected. (See, e.g., govt. brf. at 4 n.2.) The Commission has sanctioned carrier limitations of liability which are inherently unlawful because they are neither disclosed nor agreed to by shippers. These are precisely the characteristics of limitations of liability Congress sought to prohibit. In any event, when Petitioners filed their complaint case to challenge individual automatic releases, the Commission summarily dismissed it, taking no evidence and receiving no briefs.

> In view of this virtually unbroken string of decisions upholding the legality of inadvertence clauses in tariffs, we must dismiss complainant's facial attack on their use in defendants' tariffs. (Pet. App. B-8).

Thus, a fair reading of the decision warrants the conclusion that the Commission felt constrained to follow what it viewed as settled judicial construction and did not make an independent analysis of the statute. Accordingly, *Chevron* is not in point.

The contention is made repeatedly in the government's brief, based upon an erroneous assertion in the Commission's decision, that automatic tariff releases are necessary to preclude shippers from obtaining the benefit of lower released rates while shipping at full value. This is a basic misunderstanding of the current statute and directly contrary to Congressional intent. Under the statute, the carrier has three choices: (1) it can publish only full value rates; (2) it can publish full value rates and lower released value rates, leaving the shipper the option whether or not to declare a released value for rate purposes; or (3) it can publish only rates which contemplate a declaration of released value by the shipper.

A carrier which chooses the first option and, therefore, has no released rates, does not face any problem as to released rates. In the second option (which is the one followed by most carriers to date), the carrier faces none of the problems described by the government, *i.e.*, the shipper does not get the lower rate unless it declares the value on the bill of lading. It is only if it elects the third option that the carrier creates possible difficulties, *i.e.*, if it accepts the shipment and the shipper did not make a written declaration of value. But even in that situation the carrier is in complete control of whether there is a "problem". The statute gives the carrier the right to require the ship-

per to declare the limited value on the bill of lading. If the shipper does not want to release the value, the carrier can simply not accept the shipment. Moreover, even if a shipment was accepted without a declaration, the shipper would not be getting a "lower" rate, because this carrier has only one set of rates. Finally, of course, the carrier need compensate the shipper only where it has lost or damaged the shipper's freight.

With all of the above options available to the carriers and with the carrier in control of which set of rates it chooses to publish, the Commission has summarily sanctioned a fourth option which is contrary to statute. The fourth "option" is the same as (2), *supra,* but takes away the shipper's choice. If the shipper declares a value, the shipment is released. If it does not declare a value, the shipment is deemed released anyway. And what is left of the statutorily-conferred right of the shipper to elect whether or not to release the value of the shipment? Nothing. Yet the Commission has adopted a reading of the statute which nullifies its intent to guarantee the shipper's right to make a choice in writing.

III. THERE IS A CONFLICT AMONG THE CIRCUITS.

While the first section of the government's brief downgrades the Commission's reliance on the "settled" judicial construction of the statute (in order to support the argument that the ICC made its own analysis of the statute which deserved *Chevron* deference), the second section of its brief finds it expedient to argue that the construction has indeed been settled by the courts (in order to support the government's position that there is no conflict among the courts of appeals). As will be shown, the second prop of the brief is also misconceived.

Petitioners' brief cited decisions by courts of appeals in four circuits in conflict with the decision of the Third Circuit below.

Rather than acknowledging the obvious conflict and conceding these Petitioners their opportunity for a review by this Court, the government's brief chooses to undertake to distinguish all those cases as somehow not reaching a contrary conclusion. Before responding to the distinctions raised, it is worth noting that, in the argument before the Third Circuit, that court acknowledged that there is a split among the courts on the issue in question:

> Mr. Sweeney: I don't understand why counsel keeps disagreeing that there is a split — there is a split.
>
> The Court: I'll concede to you that there is a split.[3]

In *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103 (1st Cir. 1978), the shipper left blank the standard clause on the bill of lading which provides for the insertion of a released value amount. The applicable tariff provided that shipments will be deemed released to a valuation of $.60 per pound unless specifically annotated on the bill of lading at a higher amount. The court noted the general proposition that the shipper is charged with notice of the terms of a carrier's tariff but held that the shipper did not "declare in writing the released value of the goods as plainly required by the terms of the Carmack Amendment." 591 F.2d at 108. This decision is in direct conflict with the decision below construing the same statute. The government's brief seeks to dismiss this decision by suggesting, *inter alia*, that there was also a second reason given for the result reached. Regardless of that suggestion, *Anton* does stand for a statutory interpretation in direct conflict with that in the instant case.

In the Second Circuit , in both *Gordon H. Mooney, Ltd. v. Farrell Lines, Inc.*, 616 F.2d 617 (2d Cir.), *cert. denied*, 449

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[3]Transcript of Oral Argument at 48. A copy of that page is attached hereto as an Appendix.

U.S. 875 (1980) and *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428 (2d Cir. 1945), it was held that where the shipper did not write a value on the bill of lading, a tariff-stated limitation of liability was not binding in the face of the statutory requirement that the valuation must be declared in writing or agreed to by the shipper. 616 F.2d at 626; 149 F.2d at 430-32. Both are directly in point; but the government's brief refers to them as "older" cases and cites *Mechanical Technology Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1087 (2d Cir. 1985) for an opposite view.[4]

In an opinion which only served to muddy the already murky waters in the area of the status of tariff limitations of liability, the court in that case held that (1) "The existence of a tariff is not in itself sufficient to limit liability" (*id.* at 1088); (2) that there must be a "fair opportunity to choose a lower level of liability" (*id.* at 1089 n.5); but (3) that "a sophisticated shipper using its own bill of lading form can be presumed to do so deliberately with full knowledge of the consequences under the applicable tariff". The court took pains not to overrule *Mooney* and *Caten*, and limited its opinion to "the specific facts of this case", 887 F.2d 1088-89.

In *Chandler & Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967), the court quoted at length from *Caten, supra*, to the effect that a valid release requires "a certain specified agreement . . . made as the result of an equally certain specified action by the shipper in respect to a *voluntary valuation of his goods.*" (374 F.2d at 135 n.10, emphasis added by the Fourth Circuit.) There is simply no way to reconcile this standard with automatic releases. The court went on to note that arrangements

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[4]*Fine Foliage of Florida, Inc. v. Bowman Transportation Inc.*, 698 F.Supp. 1566, 1575 (M.D. Fla. 1988) also demonstrates that the "older" (and correct) interpretation of the statute remains current. Most states also subscribe to this view as to intrastate commerce.

limiting liability "contravene a strong public policy expressed in the common law, come within a carefully defined exception to the general thrust of Section 20(11) of the Interstate Commerce Act placing on the carrier absolute liability for damage, and are in operation attended by characteristics of an adhesion contract." (374 F.2d at 135, footnotes omitted.) *Accord, Mass v. Braswell Motor Freight Lines, Inc.*, 577 F.2d 665 (9th Cir. 1978).

It is argued by the government (brief at 10) that the *Chandler* and *Mass* decisions by the Fourth and Ninth Circuits are irrelevant because they did not involve automatic releases in the carriers' tariffs. The distinction the government attempts to draw is unavailing. These decisions strongly support the traditional and natural interpretation of the statute that only shippers may execute valid releases, and that such releases require actual shipper knowledge of the limitation of liability, and affirmative shipper agreement to it, manifested in some way other than mere execution of a bill of lading. Having interpreted the statute in such a way as to preclude automatic releases, these decisions (like Congress itself) did not need to go on and state that carriers cannot do in secret and on their own that which shippers must agree to in writing.

The tortuous efforts by the government and amici to dispose of precedents that conflict with the decision below, and indeed the conflicts themselves, illustrate the futility of relying on individual cases involving a lost or broken article to clarify this contentious area of the law. Shippers and carriers need the clear guidance that can only come from a comprehensive examination of the issues raised in this case.

IV. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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April 13, 1990

APPENDIX A

COPY

IN THE THIRD CIRCUIT COURT OF APPEALS

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC., Petitioners	:	
vs.	:	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents	:	NO. 89-3163
ROADWAY EXPRESS, INC.; NATIONAL FREIGHT CLAIMS & SECURITY COUNCIL OF AMERICAN TRUCKING ASSOCIATIONS; NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., Intervenors	:	

Philadelphia, PA, September 7, 1989

TAPE TRANSCRIPTION OF

HEARING IN THE ABOVE-CAPTIONED MATTER

BEFORE: THE HONORABLE CAROL LOS MANSMANN
THE HONORABLE RICHARD L. NYGAARD
THE HONORABLE RUGGERO J. ALDISERT

FOSTER COURT REPORTING SERVICE, INC.
1800 Architects Building - 117 S. 17th St.
Philadelphia, PA 19103
(215) 567-2670

MR. SWEENEY: And let me help you on that one: If all these cases cited on both sides -- and there is a split and I don't understand why counsel keeps disagreeing that there is a split, there is a split.

THE COURT: I'll concede to you that there is a split.

MR. SWEENEY: Thank you, Your Honor.

These cases, as someone pointed out before, sure, you can go out on a case-by-case basis, thousands of these loss and damage cases coming through the court every year. Here is the most important issue on the entire landscape of loss and damage law today, it's going out to the courts on a case by case with private litigants on a one-shot deal, each litigant taking their best shot and the court doing the best it can.

Most of the cases that have been cited in the briefs that say that the courts have ruled against us on this issue, if you read those cases, including the ones

No. 89-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF

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ABS Duplicators, Inc. · 912 17th Street, NW, Washington DC 20006 — 298-5537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1255

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF

Pursuant to Rule 15.7 of the Rules of this Court, Petitioners National Small Shipments Traffic Conference, Inc. and The Health and Personal Care Distribution Conference, Inc. ("Shipper Conferences") file this supplemental brief in order to bring to the Court's attention a new decision, issued April 18, 1990, supporting issuance of a writ of certiorari.

In their Petition and Reply, the Shipper Conferences pointed out that the decision of the Interstate Commerce Commission

in the proceeding below conflicts not only with decisions by federal courts of appeals and district courts, but also with decisions by states outlawing automatic releases in intrastate commerce. Petition at 8 and Reply at 8 n.4. Large numbers of shipments move in both interstate and intrastate commerce in the course of reaching their destination, and shippers are entitled to look to the delivering carrier for compensation for loss or damage, without being required to establish which of several carriers may have caused the loss or damage. See 49 U.S.C. § 11707(a)(1). Tremendous confusion will result if the same shipper act — declining to execute the release form on the bill of lading — leads to diametrically opposed results in interstate and intrastate commerce, producing limited liability under automatic releases in the former, and full liability in the latter.

Because of these interrelationships between transportation within the states and transportation among the states, conflicts between federal law and state law with respect to permissible terms of transportation service in common carriage have severe adverse impacts on the public interest that more clearly warrant review by this Court than is the case where federal and state law conflict in other areas.

Attached as an appendix to this supplemental brief is a copy of the decision of the Court of Appeals for the Third District of Texas, Austin, Texas, in *Common Carrier Motor Freight Association Inc., et al. v. NCH Corporation, et al.*, ____ SW2d ____, No. 3-89-170-CV (Tex. Civ. App. Austin, April 10, 1990.[1] In that decision, the Court of Appeals was called on to decide whether automatic releases in a motor carrier tariff approved by the Railroad Commission of Texas could be recon-

[1]Though not listed as such, these Shipper Conferences were appellees in that case, along with NCH Corporation, a member of National Small Shipments Traffic Conference, Inc.

ciled with Texas Rev. Civ. Stat. Ann. art. 883 (Supp. 1990), the Texas version of the Carmack Amendment.[2]

Affirming a decision by the lower court that reversed the decision of the Railroad Commission of Texas, the Court of Appeals held that "[T]he plain meaning of the language of art. 883 does not empower the Commission to permit the carriers to publish a tariff containing the automatic release of liability provision." Appendix A at A-4. The Court of Appeals went on to reject the argument that the automatic release provisions of the tariff, when combined with a bill of lading which contains no express release,[3] could constitute written agreement by the shipper to limit carrier liability. The Court of Appeals stated (Appendix A at A-5, emphasis in original):

> As previously written, art. 883 plainly provides that the waiver of liability, *itself,* must be a written term in the specific contract. If it is incorporated only through a reference to "tariffs", then it is merely implied in the contract and not a written provision by the shipper.

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[2]A comparison of the terms of art. 883 and its federal counterparts, formerly 49 U.S.C. § 20(11) and currently 49 U.S.C. §§ 10730 and 11707, demonstrates a clear similarity. The relevant text from art. 883 is quoted by the Court of Appeals at A-2-A-3.

[3]The bill of lading used in Texas intrastate commerce is the same as the bill of lading used in interstate commerce. In *Common Carrier Motor Freight Association,* as in the federal cases discussed in the parties' filings in this Court (except for the new 10th Circuit decision cited by the government, *Norton v. Jim Phillips Horse Transportation, Inc.*, No. 88-2630 (10th Cir. Mar. 29, 1990) (1990 U.S. App. LEXIS 4624)), the bill of lading did not state the released value established by the tariff, or inform the shipper that failure to declare a value would lead to limited liability.

Because of the need for uniformity in interstate and intrastate commerce and because of the close parallels between the Texas Motor Carrier Act and the Interstate Commerce Act and between this case and the *Common Carrier Motor Freight Association* case, these Shipper Conferences offer the attached decision as further support for their petition for a writ of certiorari.

Respectfully submitted,

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April 23, 1990

APPENDIX

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS
AT AUSTIN

No. 3-89-170-CV

COMMON CARRIER MOTOR FREIGHT
ASSOCIATION, INC., ET AL.,
APPELLANTS

VS.

NCH CORPORATION, ET AL.,
APPELLEES

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
261ST JUDICIAL DISTRICT NO. 408,561,
HONORABLE HUME COFER, JUDGE PRESIDING

Appellants Common Carrier Motor Freight Association, Inc. (carriers) and the Railroad Commission seek to set aside the judgment of the district court of Travis County. By its judgment, the district court overturned the Commission's order directing the issuance of tariffs that would limit the liability of carriers for damage done to freight in their possession. Appellees are several shipper associations (shippers). This Court will affirm the judgment.

The Commission's order directed the carriers to issue and publish Tariff 500. The relevant part of Tariff 500, the so-called

"automatic release" provision, provides that the carrier's liability for damaged cargo is limited to fifty dollars per shipment unless the shipper declares in writing before tender a higher value for the cargo. The automatic release provision of Tariff 500 reversed the common law rule that the carrier is responsible for the total damage to cargo. Southern Pac. Ry. Co. v. Maddox, 12 S.W. 815, 817 (Tex. 1889).

The shippers contended in district court that the automatic release of liability provision was contrary to Tex. Rev. Civ. Stat. Ann. art. 883 (Supp. 1990). The district court agreed and concluded that the Commission's order sanctioning the automatic release of liability provision was in excess of the Commission's authority because it purported to limit the carrier's liability in the absence of the shipper's written consent.

On appeal, appellants challenge the district court's conclusion that art. 883 prohibits the Commission's adoption of the automatic release provision. In support of their challenge, appellants claim (1) that art. 883, read in conjunction with Tex. Bus. & Com. Code Ann. § 7.309 (1968), authorizes the automatic release of liability, and (2) that because all tariffs are incorporated by law into the contract between the shipper and carrier, the automatic release of liability is, indeed, a part of the written agreement as contemplated by art. 883.

Texas Rev. Civ. Stat. Ann. art. 882 (1964), provides that carriers be held liable as they are at common law, except as otherwise provided. Article 883 sets forth the one exception to this rule:

> . . . [p]rovided, however, that the provisions hereof respecting liabilities of carriers as it exists at common law for loss, damage, or injury to . . . goods, wares, and merchandise shall not apply to property received for transportation concerning which the carriers shall have been or shall hereafter be expressly

> authorized or required by order of the Railroad Commission of Texas to establish and maintain rates dependent upon the value declared in writing by the shipper of the property or agreed upon in writing as the released value of the property, in which case, such declaration or agreement shall have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, and so far as relates to values, shall be valid and is not hereby prohibited. . . .

Section 7.309(b) provides:

> Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.

Application of § 7.309 to the tariff provision in this appeal, however, is governed in turn by Tex. Bus. & Com. Code Ann. § 7.103 (1968) which expressly provides that provisions in Chapter 7 of the Code are made subject to regulatory statutes. Accordingly, § 7.309 is subject to the terms of art. 883. Section 7.309, then, cannot authorize limitation of carrier liability in contravention of art. 883.[1]

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[1]Appellants rely upon Elizabeth-Perkins, Inc. v. Morgan Exp., Inc., 554 S.W.2d 216 (Tex. Civ. App. 1977, no writ). We recognize that the tariff in *Elizabeth-Perkins* was substantially similar to the tariff at issue here. However, the court in *Elizabeth-Perkins* was not called upon to address the validity of the tariff, but instead to examine the effect of the tariff on a particular claim. The opinion in *Elizabeth-Perkins* does not support the proposition that § 7.309 may abrogate a statutory constraint on what may be included in a tariff; rather, it only concerns the effect of § 7.309 on a specific question regarding a presumably valid tariff.

Contrary to appellants' suggestion, this Court does not regard art. 883 to be ambiguous. Article 883 expressly provides that, in general, the common law rule of carrier responsibility applies. At common law, the carrier is fully liable for all damage to cargo in its possession under circumstances that impose an obligation. *Southern Pac. Ry. Co.*, 12 S.W. at 817. Nevertheless, the legislature in art. 883 provided one exception: only a written exception on the bill of lading will release the carrier from full liability (a carrier may "establish and maintain rates dependent upon the value declared in writing by the shipper").

The legislative intent *as expressed in the statute* must be given controlling importance. Citizens Nat. Bank v. Calvert, 527 S.W.2d 175, 180 (Tex. 1975). An agency construction of the statute must, of course, be consistent with the statutory wording and only in those instances in which the plain meaning of the statute works an absurdity may it be disregarded. *Id.* at 180.

In sum, this Court concludes that the plain meaning of the language of art. 883 does not empower the Commission to permit the carriers to publish a tariff containing the automatic release of liability provision.

Appellants' second argument concerns whether a tariff may be considered a "writing" within the meaning of art. 883. A bill of lading generally expresses that it is "subject to the provisions of governing tariffs." Regulations and tariffs promulgated and approved by the regulating agency coupled with the bill of lading constitute the contract between the shipper and the carrier. *See* Railway Exp. Agency, Inc. v. Ferguson, 242 S.W.2d 462, 464 (Tex. Civ. App. 1951, writ dism'd); Continental Transfer & Storage Co. v. Swann, 278 S.W.2d 413, 415 (Tex. Civ. App. 1954, writ dism'd); *see also* Modern Whsle. Florist v. Braniff Int. Airways, Inc., 342 S.W.2d 225, 227 (Tex. 1960). Appellants suggest that the bill of lading along

with the automatic release provision adopted by Tariff 500 constitutes a "written agreement" pursuant to art. 883. This Court does not agree.

As previously written, art. 883 plainly provides that the waiver of liability, *itself,* must be a written term in the specific contract. If it is incorporated only through a reference to "tariffs," then it is merely implied in the contract and not a written provision by the shipper.

Appellants' points are overruled.

The judgment of the district court is affirmed.

Bob Shannon, Chief Justice

[Before Chief Justice Shannon, Justices Carroll and Aboussie; Justice Carroll not participating]

Affirmed
Filed: April 18, 1990
[Publish]